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There is ample statistical evidence that a significant number of crimes are committed by persons who are to some extent under the influence of alcohol.[2] Certainly intoxication is a frequently recurring issue in criminal cases, particularly in homicide crimes. What legal effect evidence of intoxication should have is a question which has been answered differently over time and among jurisdictions. In Great Britain, and the United States generally, the defense of intoxication first achieved recognition about 1820. Its first appearance in the Commonwealth of Pennsylvania in 1794 was apparently somewhat precocious. The emergence of the defense in Pennsylvania has roughly coincided with its efflorescence gener-

1. The writer wishes to thank Professor Arthur A. Murphy of the Dickinson School of Law for the many hours he generously devoted to helping the writer sort out the complexities of the intoxication defense. Any merit in the following article is due largely to Professor Murphy's ceaseless effort to keep the writer on the right track. A few of the conclusions and all of the errors are solely the responsibility of the author.

2. *See, e.g.*, 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 223 (1970).

ally, although in its details the defense has not developed uniformly anywhere.

A scholar in search of logic, consistency, and clarity of expression in the law would do well to look elsewhere than in the cases involving intoxication as a defense. The grounds of the defense have always suffered from a tendency to shift, almost imperceptibly, from case to case and from court to court, a tendency not generally recognized, or at least not explicitly acknowledged, by courts or commentators. The present Pennsylvania law on the intoxication defense gives an appearance of simplicity and well-settled resolution to the issues which belies the fact that behind the generalities lurks a host of old and unanswered questions. For example: How is evidence of intoxication being offered by the defendant—as tending to negative an element of the offense, or as an affirmative defense? If the latter, then what degree of intoxication is required? How is it to be proved? How does the law measure the physiological and psychological effects of alcohol in terms of legal culpability? How does the intoxication defense compare to the insanity defense? Does present law operate fairly in excluding intoxication from the defenses to certain (general intent) crimes, and in placing the burden of proof of intoxication upon the defendant?

The objectives of this paper are to illuminate the state of the present law by a brief survey of the historical development of the defense in Pennsylvania, to analyze the shifting bases and corollaries of the defense, to appraise both criticisms of the present law and proposed changes, and finally, to suggest some modifications and clarifications of present law. Information on the defense is arranged in a more immediately practical fashion in the collection of Pennsylvania cases and the model jury instructions found in the appendices.

I. Brief History of the Defense in Pennsylvania

Pre-nineteenth century law in Britain and the United States apparently regarded evidence of intoxication, when it regarded it at all, as an aggravation of crime, and not as a defense to asserted criminal intent.[3] Intoxication was viewed as a vice, if not as a crime in itself, of which the accused could take no affirmative advantage. The opprobrium with which drunkenness was regarded extended to attempts at pleading it defensively because, it was observed, intoxication often seems to "suggest" crime. The earliest Commonwealth case discovered by the author reflected these classical views. If an accused were permitted to plead intoxication, it

3. Director of Public Prosecutions v. Beard, 14 Crim. App. 159 (H.L. 1920); Annot., 12 A.L.R. 846 (1921); J. Hall, General Principles of Criminal Law 529-44 (2d ed. 1960); G. Williams, Criminal Law 559-64 (2d ed. 1961).

was stated, the door would be opened "for the practice of the greatest enormities with impunity."[4] This stringent moral aversion to the defense survived its acceptance into the law, and finds echoes in some of the later cases.[5] In fact, anti-liquor bias was probably one of the forces responsible for the subsequent restriction and even rolling-back of the defense once it had become established.

In any event, by 1819 intoxication had gained its first foothold in English law, when evidence of intoxication was admitted in a murder case as relevant to the question whether the act had been premeditated, or done only in the "stress, heat, or impulse of the moment."[6] Interestingly, the defense had entered Pennsylvania law in precisely the same circumstances twenty-five years earlier. The court in *Pennsylvania v. M'Fall* clearly stated the conditions under which the defense was permitted:

> Drunkenness does not incapacitate a man for forming a premeditated design of murder; but frequently suggests it. A drunk man may certainly be guilty of murder. But as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design. . . .[7]

It is essential to an understanding of how intoxication came to be a defense to a criminal charge to examine the factual situation in *M'Fall.* The intoxicated defendant had been arguing with another patron in a tavern and threatened to kill him. The patron left, and the bartender ordered the defendant to leave because of his inebriated and quarrelsome condition. The defendant shook hands with the bartender and left. Two minutes later the defendant attempted to reenter the bar. The bartender tried to keep him outside, and in the ensuing fist-fight the bartender was killed. The salient points in this factual situation are these: the suddenness of the fight; absence of a deadly weapon; lack of (or great doubt about) the motive of the defendant and lack of opportunity for reflection, both bearing on the question of premeditation; and the intoxicated and quarrelsome condition of defendant. In other words, in *M'Fall* intoxication was simply evidence which, together with the other *res gestae*, tended to negative the element of specific intent to take life, the *sine qua non* of premeditated murder. Of course, if suc-

4. Respublica v. Weidle, 2 Dall. 88 (Pa. 1781).
5. Commonwealth v. Spega, 19 Beav. 11 (Pa. C.P. 1957); Commonwealth v. Trowbridge, 13 Beav. 251 (Pa. C.P. 1951); Commonwealth v. Platt, 11 Phila. 415, 421 (Pa. C.P. 1876); Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868).
6. Director of Public Prosecutions v. Beard, 14 Crim. App. 159 (H.L. 1920); Annot., 12 A.L.R. 846, 854 (1921).
7. Pennsylvania v. M'Fall, Add. 255 (Pa. 1794).

cessful, the defendant's evidence of intoxication could only prevent the crime from rising to first-degree murder, leaving him guilty of murder in the second degree. Since the evidence of intoxication was offered in order to negative the element of premeditation, and not as an affirmative defense, the burden of proof remained upon the state.

Very likely the early appearance of the defense in Pennsylvania was facilitated by the division of murder into premeditated and nonpremeditated murder by the legislature in 1794. Because it distinguished the degrees of murder in terms of a "fully formed intent" to take life,[8] the Act of 1794 perhaps brought into stronger light the classical arbitrariness which simply excluded all evidence of intoxication as a defense. As *M'Fall* demonstrates, in the original cases the question was not whether the accused had been capable of forming the intent to kill required in premeditated murder; the question was rather whether he had in fact premeditated,[9] and as intoxication was held to be evidence of passion, impulse, etc., it was some evidence that he had not. It is fair to say that the debut of intoxication as evidence for the defense in criminal cases did no more than restore to intoxication its logically relevant place as evidence negativing an asserted mental element. When this mental element (*i.e.*, premeditation in the original cases) came to be identified by statute as the distinguishing feature of a particular crime, the then-conventional exclusion of evidence of intoxication appeared more egregious, and was finally repudiated.

Had it not been for the interjection of another element into the equation, there is no reason to suppose that the law would have been greatly troubled by the intoxication defense. But, for better or worse, it was not long until the simple terms on which the de-

8. Commonwealth v. Drum, 58 Pa. 9 (1868).

9. An actor who is found to have premeditated in fact is found by necessary implication to have been capable of premeditation, but an actor found to have been capable of forming a deliberate, willful, premeditated intent may or may not in fact have formed it. This distinction has long been recognized. 2 W. TRICKETT, THE LAW OF CRIMES IN PENNSYLVANIA 735-39 (1908) [hereinafter cited as TRICKETT]. It is not an inconsequential difference, particularly because the imposition of the burden of proof may depend upon the distinction. Whether or not the distinction has been lost sight of or abandoned is a recurring question throughout this paper.

Today, when reference is made to intoxication as negativing an element of the offense, it is often unclear whether the "ordinary" or affirmative branch of the defense is being referred to. Where capacity to form a criminal intent is the issue, it seems anomolous to refer to the defense as negativing an element of the offense. At least this formulation is not used in other cases of asserted incapacity, such as insanity and infancy. Of course, if the actor was unable to form an intent, that fact is inconsistent with conviction if proved, but a defense (as in infancy and insanity) based on incapacity seems to reach further than merely negativing an element in the charge. It seems better to speak of intoxication as negativing the state's case only where the ordinary branch of the defense is being followed (as in *M'Fall*), *i.e.*, where the defense does not rest upon an asserted incapacity to form an intent, but rather where evidence of intoxication may make it more likely that the defendant had not in fact formed the required intent.

fense had originally been admitted were altered by the appearance of the question of alcohol's effect upon the actor's ability to *form* a specific intent. Once this question of capacity to form an intent gained the spotlight, confusion set in, and to this day the law bears the scars of the battle over and the retreat from the position that intoxication should be treated like insanity.

The question of capacity to form an intent began to replace the question of whether an intent had in fact been formed, a process which got underway sometime before the Civil War. It is not clear exactly how this came about, but an examination of the factual situations in which the defense came to be raised may provide some clue. Evidence of intoxication continued to be offered, as it was in *M'Fall*, in order to negative the asserted mental element of premeditation in cases where the facts bore some similarity to those in *M'Fall, i.e.*, where there was no positive evidence of premeditation, no motive indicating premeditation, where the homicide occurred during a quick fight, etc.[10] But in other cases, the *res gestae* tended to indicate premeditation, as where there was evidence of grudge, motive, extended altercation, opportunity to cool and to reflect, prior threats, use of a deadly weapon, etc.[11] Certainly in such cases defendants could expect little benefit from a charge which related the evidence of intoxication to the likelihood of a quick, passionate, or impulsive killing. The natural tendency of the defense in such cases must have been to push for extension of the relevance of the evidence of intoxication toward the insanity defense, to stress the asserted lack of legal capacity of the defendant to form an intent, rather than to contend that he had not in fact conceived a design to kill. While the exact provenance of the capacity issue remains problematic, the fact is that courts began to speak in terms of capacity to form an intent, as well as in terms of whether or not an intent had in fact been formed. Indeed the two different approaches to the defense soon became confused.[12] Some courts seemed to recognize that the questions of capacity and intent were distinct:

> The true criterion as to the capability of the prisoner to commit murder in the first degree is not whether he was drunk or sober, but whether he had the power at the time deliberately to form and plan in his mind the design and intention of killing his victim. *If he had such power*

10. Keenan v. Commonwealth, 44 Pa. 55 (1862); Kelly v. Commonwealth, 1 Grant 484 (Pa. 1858); Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868); Commonwealth v. Perrier, 3 Phila. 229 (Pa. C.P. 1858).

11. Brooks v. Commonwealth, 61 Pa. 352 (1869); Warren v. Commonwealth, 37 Pa. 45 (1860); Kilpatrick v. Commonwealth, 31 Pa. 198 (1858).

12. TRICKETT at 735 *et seq.*

> *and did deliberate,* plan and conceive the intention . . . then the crime would be murder in the first degree.[13]

Other courts thought that the issues were the same, regardless of the purpose for which the evidence of intoxication was adduced:

> To reduce the grade of the crime, therefore, where the evidence on the part of the Commonwealth was such as to make out a *prima facie* case of murder in the first degree, evidence showing want of deliberation, or, *which is the same thing,* an incapacity to deliberate, is of course proper to be received.[14]

Still other courts spoke of evidence of intoxication both in terms of capacity and intent simultaneously, without apparent recognition that there was any distinction.[15]

As the intoxication defense began to tend toward the insanity defense, a sort of reaction to the extension of the defense appears to have set in. This reaction took shape in the form of the imposition upon the defendant of the burden of proof of sufficient intoxication.[16] In some of these early cases, the burden appeared to continue to rest upon the state;[17] in other cases it is not clear where the burden lay.[18] But even before the Civil War, it came to be held by some courts that the defendant had the burden of proof of intoxication by a preponderance of the evidence.[19] It seems only natural that the burden of persuasion came to rest upon the defendant as the intoxication defense tended toward the affirmative defense of insanity. Without stating their reasons, the early courts placed another restriction upon the extension of the defense. It was held that even where an actor's capacity to form a specific intent was in issue, so long as the asserted incapacity was caused by intoxication, the defense could never be complete—it could only succeed (in the case of homicide) in preventing the offense from rising to the higher grade (of premeditated murder).[20] Doubtless

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13. Commonwealth v. Perrier, 3 Phila. 229, 235 (Pa. C.P. 1858) (emphasis added).

14. Warren v. Commonwealth, 37 Pa. 45, 55 (1860) (emphasis added).

15. Kelly v. Commonwealth, 1 Grant 484 (Pa. 1858).

16. *See* TRICKETT at 740-41.

17. Commonwealth v. Woodley, 166 Pa. 463, 31 A. 202 (1895); Kelly v. Commonwealth, 1 Grant 484 (1858); Commonwealth v. Perrier, 3 Phila. 229 (Pa. C.P. 1858); E. LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 406 (1848) (*see* note 20 *infra*).

18. Keenan v. Commonwealth, 44 Pa. 55 (1862); Kilpatrick v. Commonwealth, 31 Pa. 198 (1858); Commonwealth v. Crozier, 1 Brewst. 349 (Pa. 1867).

19. Warren v. Commonwealth, 37 Pa. 45 (1860); Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868).

20. Brooks v. Commonwealth, 61 Pa. 352 (1869); Keenan v. Commonwealth, 44 Pa. 55 (1862); Kilpatrick v. Commonwealth, 31 Pa. 198 (1858). *Mania a potu* (delirium tremens) was distinguished from other types of "madness" caused by voluntary intoxication in terms of the legal effects of the two defenses. Insanity in the former case was a complete defense, whereas insanity in the latter was only a partial defense, reducing murder from the first to the second degree, or preventing the murder from rising to the first degree. The burden of proof was upon the defendant in regard

this limitation seemed more natural because the same result was reached where only intent, and not capacity was the issue, but it was certainly not a logically imperative result, especially since the defense of insanity was complete.[21] Perhaps the explanation is that the courts considered the impaired capacity resulting from intoxication as lesser in degree than the total mental disability of the insane.[22] Or perhaps it was simply that courts disapproved of the manner in which the incapacity was arrived at, no matter how severe. Certainly all traces of antagonism to the defense had not disappeared,[23] and some courts detected a drift toward total subjectivization of criminal responsibility if personal "susceptibilities" were taken too much into account.[24] Finally, some courts seemed to want to limit even those defenses based not upon the issue of capacity, but only upon the issue of whether or not an intent had in fact been formed. These courts apparently feared that if alcohol were too closely associated with assertedly "passionate" or impulsive killings, the next step would be to lower such killings to the level of voluntary manslaughter.[25] In fact, this appears to have been the result in some cases.[26] Unfortunately, while forestalling this possibility, evidence relevant to negativing premeditation seems also to have been excluded.[27]

Prior to the Civil War the law was, in general, shaking itself

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to "settled" insanity (such as *mania a potu*) since it could result in complete exoneration, but the defendant apparently did not have the burden in regard to the "partial" defense of voluntary intoxication resulting in insanity (temporary, not settled). E. LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 405-06 (1848).

21. *See* TRICKETT 738-39.

22. It seems to have been recognized at a fairly early date that there exist some types of (complete) insanity which result from intoxication, such as delirium tremens. Goersen v. Commonwealth, 106 Pa. 477 (1884); Commonwealth v. Crozier, 1 Brewst. 349 (Pa. 1867); E. LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 405 (1848); TRICKETT at 744 *et seq.*, 1115-16. *See also,* Commonwealth v. Moore, 2 Pitts. Rep. 502 (Pa. C.P. 1864). But beyond these "recognized" examples of alcoholic insanity, the waters were uncharted, and the subsequent history of the defense of intoxication demonstrates the difficulty in drawing the line between legal insanity resulting from intoxication and lesser states of mental impairment. This question is still not resolved (apparently) in modern law, and the continuing uncertainty about when intoxication may result in legal insanity is another recurrent theme in this paper.

23. Commonwealth v. Platt, 11 Phila. 415, 421 (Pa. C.P. 1876); Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868).

24. Commonwealth v. McGowan, 189 Pa. 641, 42 A. 365 (1899); Keenan v. Commonwealth, 44 Pa. 55 (1862).

25. *See* TRICKETT at 744-45.

26. Commonwealth v. Baker, 11 Phila. 631 (Pa. C.P. 1876); Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868).

27. *See* Keenan v. Commonwealth, 44 Pa. 55 (1862).

out and trying to settle on the details of the intoxication defense. The largest unresolved issue obviously was how far the defense of intoxication could go when it was the actor's capacity to form an intent which was in issue. Some courts used language similar to that employed in the *M'Naghten* test when charging juries in terms of capacity,[28] while other courts excluded relevant evidence tending to show states of alcoholic insanity.[29] The general rule seemed to be that the insanity and intoxication defenses could merge completely only in cases of *mania a potu* (delirium tremens).[30] But of course, that left unsettled the question of what the test should be in cases where capacity was the issue, but *mania a potu* was not asserted. At this juncture the landmark case of *Jones v. Commonwealth*[31] was decided, and for a short time it appeared that, although ordinary intoxication could never be a complete defense, the test for mental capacity would be the same both in cases of insanity and of intoxication.

In *Jones v. Commonwealth* the concept of an alcohol-impaired incapacity to form a specific criminal intent seemed to blossom into a broad, subjective test of criminal responsibility taking the jury much further afield than it had yet been permitted to go. After noting that the capability of determining a purpose, selecting means of accomplishment, and being shrewd and watchful (which it called "intelligence") was not the only criterion of premeditated murder, and that, in any event a drunk was clearly capable of intelligence so defined, the court held that the distinguishing element of premeditated murder, the element toward which the intoxication defense was aimed, was another type of "capability." Even when a drunk possesses intelligence, said the court:

> [T]here may be an absence of the power to determine properly the true nature and character of the act, its effect upon the subject, and the true responsibility of the actor; a power necessary to control the impulses of the mind and prevent the execution of the thought which possesses it. In other words, it is the absence of that self-determining power, which in a sane mind renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses. When this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influence, it cannot be said truthfully that the mind is fully conscious of its own purposes, and deliberates or premeditates in the sense of the act describing murder in the first degree. . . .[32]

If the language of *Jones* is related to the factual context of the case, however, it is much less clear that the court intended to approach

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28. Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868).
29. Warren v. Commonwealth, 37 Pa. 45 (1860).
30. Commonwealth v. Crozier, 1 Brewst. 349 (Pa. 1867). *See* note 22 *supra.*
31. 75 Pa. 403 (1874).
32. *Id.* at 408.

the insanity defense as closely as its words seem to indicate. The defendant Jones had discovered his wife unfaithful, and in consequence of his failure to persuade her to return to his affections, he attempted suicide with laudanum. He was found in time, and was revived. But the effects lingered, the defendant took to heavy drinking, and there was evidence that he had also ingested further quantities of laudanum. There was a great deal of testimony that the defendant had become insane through the combined influences of despair, drugs, and alcohol. Nine days after his attempted suicide, the defendant sought out his estranged wife in the home of his mother-in-law, with whom he had been on very good terms. As he approached her to inquire about his wife, his mother-in-law threatened to throw a stool at him if he did not leave, whereupon the defendant produced a pistol and shot the mother-in-law dead. Immediately after the killing the defendant expressed regret, saying that he had intended to use the gun on his wife. These facts indicate, perhaps even more strongly than the facts in *M'Fall*, an unpremeditated, impulsive murder. It is not at all clear why the court chose this opportunity to set up what amounted to an insanity test for the intoxication defense, especially since the result in *Jones* was that the court simply reduced the grade of the murder to the second degree. Certainly this could have been accomplished without the unnecessary embellishment of a quasi-insanity test; the facts clearly negatived the element of premeditation, leaving the state with only a case of second degree murder. Very likely, the broad language of the court was intended only as a description of the defendant's state of mind, and not as an announcement of a new test for criminal responsibility where intoxication was set up as a defense.

Whatever the court may have intended by its language in *Jones*, defense attorneys were not slow in recognizing the apparent invitation to extend the intoxication defense to the very grounds of the insanity defense. After *Jones* the intoxication defense tended more and more to be set up in cases where there was abundant evidence of premeditation.[33] Obviously, in such cases

33. Commonwealth v. Johnson, 410 Pa. 605, 190 A.2d 146 (1963); Commonwealth v. Farrow, 382 Pa. 61, 114 A.2d 170 (1955); Commonwealth v. Jones, 355 Pa. 522, 50 A.2d 317 (1947); Commonwealth v. McCausland, 348 Pa. 275, 35 A.2d 70 (1944); Commonwealth v. Kline, 341 Pa. 238, 19 A.2d 59 (1941); Commonwealth v. Iacobino, 319 Pa. 65, 178 A.2d 823 (1935); Commonwealth v. Prescott, 284 Pa. 255, 131 A. 184 (1925); Commonwealth v. Troy, 274 Pa. 265, 118 A. 252 (1922); Commonwealth v. Keeler, 242 Pa. 416, 89 A. 558 (1913); Commonwealth v. Detweiler, 229 Pa. 304, 78 A. 271 (1910); Commonwealth v. Fencez, 226 Pa. 114, 75 A. 19 (1910); Commonwealth v. Dudash, 204 Pa. 124, 53 A. 756 (1902); Commonwealth v. Cleary,

defendants could only hope to profit from the defense if the outward evidence of specific intent were overshadowed in juries' minds by evidence of intoxication indicating a disabled, (nearly?) insane mind. *Jones* was often cited,[34] in the years immediately succeeding, and "quasi-insanity" tests were applied to intoxication defenses.[35]

But other courts almost as immediately began to back away from the broad language in *Jones*. On the one hand it was dis-

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135 Pa. 64, 19 A. 1017 (1890); McClain v. Commonwealth, 110 Pa. 263, 1 A. 45 (1885); McGinnis v. Commonwealth, 102 Pa. 66 (1883); Nevling v. Commonwealth, 98 Pa. 322 (1881). Consider, for example, the facts in Commonwealth v. Johnson. The intoxicated defendant got into a fight with the decedent at a bar. The police intervened, and the defendant was sent to a hospital for treatment of a laceration. At the hospital the defendant was given a small quantity of pain killer. An hour or so later the accused told another person that he would "get" the decedent for having "ganged" him. Defendant sought out a gun shop, waited an hour for it to open, bought a gun, and returned to the bar where he immediately shot and killed the decedent. The accused, contemplating his dying victim, expressed the wish that the victim would die.

34. Commonwealth v. Woodley, 166 Pa. 463, 31 A. 202 (1895); Commonwealth v. Cleary, 135 Pa. 64, 19 A. 1017 (1890); Nevling v. Commonwealth, 98 Pa. 322 (1881); Commonwealth v. Senft, 12 Pa. D. & C. 735 (1929); Commonwealth v. Gentry, 5 Pa. Dist. 703 (1895); Commonwealth v. Baker, 11 Phila. 631 (Pa. C.P. 1876); Commonwealth v. Platt, 11 Phila. 415, 421 (Pa. C.P. 1876).

35. The attempts of other courts to apply quasi-insanity tests after the decision in *Jones* seem, in retrospect, to be an exercise in confusion. Some courts at first appeared to hold that intoxication resulting in insanity (exclusive of delirium tremens) could provide a complete defense. Nevling v. Commonwealth, 98 Pa. 322 (1881); Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868), perhaps if "idiocy" had resulted. Commonwealth v. Woodley, 166 Pa. 463 (1895); Goersen v. Commonwealth, 106 Pa. 477 (1884). Other courts adhered to the view that only a reduction in the degree of the murder was possible (unless, apparently, delirium tremens had resulted). Commonwealth v. Detweiler, 229 Pa. 304, 78 A. 271 (1910); Commonwealth v. Eyler, 217 Pa. 512, 66 A. 747 (1907); Commonwealth v. Dudash, 204 Pa. 124, 53 A. 756 (1902); Commonwealth v. West, 204 Pa. 68, 53 A. 542 (1902); Commonwealth v. McGowan, 189 Pa. 641, 42 A. 365 (1899); Commonwealth v. McManus, 143 Pa. 64, 21 A. 1018 (1891); Commonwealth v. Cleary, 135 Pa. 64, 19 A. 1017 (1890); McGinnis v. Commonwealth, 102 Pa. 66 (1883). One court held that only pre-existing insanity, coupled with intoxication could provide a complete defense. Commonwealth v. Baker, 11 Phila. 631 (Pa. C.P. 1876). Perhaps the apex of judicial despair over the question of the legal effect of evidence of intoxication was reached in Commonwealth v. Woodley, where the court candidly remarked that "perhaps" intoxication which had "thoroughly unhinged" the defendant's mind would provide a complete defense. The court simply left the entire question with the jury, instructing them only that they should be guided by their opinion of the extent of the defendant's intoxication. In general, the problem of intoxication as insanity was in a turbid state after *Jones*. *See* TRICKETT at 735-51.

Just as courts were uncertain of the objective of evidence of intoxication, so they were uncertain what sorts of evidence could be admitted, and for what purposes. Evidence of a defendant's alcoholic history or his conduct when intoxicated, his family history of alcoholism, and even evidence of how much the defendant had drunk and how he had acted were treated differently, depending upon the court's view of the limits of the defense. *See* TRICKETT at 741-44. Since there was no general agreement about the legal effect of the defense itself, it is not surprising that there was no agreement on what types of evidence were admissible.

tinguished and confined to its facts,[36] while on the other hand a full-scale reaction to the equation of the legal effects of insanity and intoxication set in. It was held that intoxication (at least in the "normal" case) could amount at most to a sort of "partial" insanity, not a complete defense, but only serving to reduce the grade of the murder to the second degree.[37] Courts continued to stress outward facts as solid evidence of premeditated purpose,[38] acts such as assault with a deadly weapon,[39] the presence of pre-existing grudges or other motives,[40] or prior threats.[41] A typical example of the attitude which began to harden about the turn of the last century is found in *Commonwealth v. Snyder*, where the court insisted that the defenses of intoxication and insanity must be kept separate, not only because of the possibility of complete exoneration in the case of the former, but also because:

> Were it otherwise, it would follow that in every case where intoxication is set up, a necessary inquiry would be the susceptibility of the party to intoxicating influence, and the question of guilt would be made to depend upon pecularity of individual temperament as affected by drink. The law knows no such doctrine; it does not divide men into classes according to temperament or intellect judging some more favorably than others. . . .[42]

While the courts were generally retreating from the effort being made to equate the tests for intoxication and insanity, there also appeared to be an abandonment of attempts to adduce evidence of intoxication as merely negativing the element of premeditation (*i.e.*, an abandonment of defenses not based on an asserted lack of capacity to conceive a specific intent). Doubtless this resulted primarily from the recognition that the capacity approach had wider application, including defendants whose acts otherwise indicated all the elements of premeditation. Another factor may have been that courts themselves continued to fear the possibility that if evi-

36. Commonwealth v. Detweiler, 229 Pa. 304, 78 A. 271 (1910); Nevling v. Commonwealth, 98 Pa. 322 (1881).

37. Commonwealth v. McMurray, 198 Pa. 51, 47 A. 952 (1901); Commonwealth v. Werling, 164 Pa. 559, 30 A. 406 (1894); Meyers v. Commonwealth, 83 Pa. 131 (1876).

38. TRICKETT at 740, 748-50.

39. Commonwealth v. Ingram, 440 Pa. 239, 270 A.2d 190 (1970); Commonwealth v. Jones, 355 Pa. 522, 50 A.2d 317 (1947); Commonwealth v. Iacobino, 319 Pa. 65, 178 A. 823 (1935); Commonwealth v. Lisowski, 274 Pa. 222, 117 A. 794 (1922); Commonwealth v. Boyd, 246 Pa. 529, 92 A. 705 (1914).

40. Commonwealth v. Gentry, 5 Pa. Dist. 703 (1895).

41. Commonwealth v. McMillan, 144 Pa. 610, 22 A. 1029 (1891); Nevling v. Commonwealth, 98 Pa. 322 (1881); Commonwealth v. Gentry, 5 Pa. Dist. 703 (1895).

42. 224 Pa. 526, 530, 73 A. 910, 912 (1909).

dence of intoxication were offered as proof of passion, impulse, etc., there might be a tendency by juries to return verdicts of voluntary manslaughter.[43] Certainly most of the factual contexts in which the defense has been raised in this century indicate that evidence of intoxication would have had practically no effect as tending to negative the element of premeditation. But there are some cases in which it appears that the better approach might have been to avoid the issue of capacity, and to have concentrated on merely negativing the state's case.[44] Today, courts[45] as well as commentators[46] speak of the defense only as an affirmative one, with the burden of persuasion upon the defendant. *Commonwealth v. McMillan*[47] appears to be the last Pennsylvania appellate case on record where the distinction between evidence of intoxication offered only to negative premeditation, as opposed to evidence offered to prove incapacity to form a specific intent, was recognized.

In any event, well before the Second World War it could safely have been said that the intoxication "charge" given in *Jones* was a dead letter.[48] From the various historical accretions to and subtractions from the theory that the legal test for intoxication-impaired capacity was the same as that for insanity has emerged the present Pennsylvania law, which is, if nothing else, rather succinct considering the intricate history of the defense. In contemporary cases, the Pennsylvania Supreme Court has said that although voluntary intoxication is neither an excuse nor an exoneration,

> intoxication which is so great as to make the accused incapable of forming a wilful, deliberate, and premeditated design to kill, or incapable of judging his acts and their consequences, may serve to reduce the crime of murder from the first to the second degree.[49]

Certain corollary principles concerning the intoxication defense have emerged over the years. It is now well-established that

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43. Commonwealth v. Ingram, 440 Pa. 239, 270 A.2d 190 (1970); Commonwealth v. Brown, 436 Pa. 423, 260 A.2d 742 (1970); Commonwealth v. McGowan, 189 Pa. 641, 42 A. 365 (1899).

44. Commonwealth v. Brabham, 433 Pa. 491, 252 A.2d 378 (1969); Commonwealth v. Brent, 233 Pa. 381, 82 A. 469 (1912). *See* Commonwealth v. Ault, 10 Pa. Super. 651 (1899).

45. Commonwealth v. Iacobino, 319 Pa. 65, 178 A.2d 823 (1935).

> The defense of insanity is an affirmative one and must be established by the defendant by "fairly preponderating evidence". . . . Similarly, when the defense is intoxication, the burden is on the defendant to establish that his intoxication was such as to prevent forming any intent. . . .

Id. at 68, 825.

46. B. LAUB, PENNSYLVANIA TRIAL GUIDE, § 195 at 370-73 (1959); LEVIN, LEVIN & LEVIN, SUMMARY OF PENNSYLVANIA JURISPRUDENCE, CRIMINAL LAW, §§ 60-63 at 62-64 (1955).

47. 144 Pa. 610, 22 A. 1029 (1891).

48. *See* Commonwealth v. Lehman, 309 Pa. 486, 164 A. 526 (1932); Commonwealth v. Walker, 283 Pa. 468, 129 A. 453 (1925).

49. Commonwealth v. Brabham, 433 Pa. 491, 494, 252 A.2d 376, 378 (1969).

intoxication is no defense to murder perpetrated during the commission of a felony.[50] Another principle is that although a defendant may not plead "diminished responsibility" in seeking to reduce a criminal charge, evidence of intoxication offered for that purpose is admissible, at the discretion of the court, on the question of sentencing.[51] Finally, it has become settled that intoxication is no defense to a criminal charge where it can be proved that the intent was formed before the actor became intoxicated, regardless of the degree of intoxication existing at the moment the offense was actually committed.[52]

The first non-homicide case in which a Pennsylvania appellate court considered the defense of intoxication is apparently *Commonwealth v. Ault.*[53] The decision in *Ault* reflects the confusion which prevailed about the intoxication defense in the years during which the retreat from *Jones* was in progress. The facts in *Ault* were that the defendant, on his way out of church, removed some horse blankets, fur robes, and horse whips from his neighbors' conveyances, put them in his own buggy, and drove home, apparently without attempt at concealment. He was tried and convicted of larceny. The defense was intoxication which prevented the defendant from realizing that he had possession of other persons' property. The defense tried to restrict the evidence to a rebuttal of the intent to deprive (taking "with the mind of a thief"), but the trial court apparently would not permit this offer. Instead, the court seems to

50. Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966); Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216 (1954); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949), *cert. denied*, 338 U.S. 862 (1949), *reh. denied*, 338 U.S. 888 (1949); Commonwealth v. Brooks, 355 Pa. 551, 50 A.2d 325 (1947); Commonwealth v. Wooding, 355 Pa. 555, 50 A.2d 328 (1947); Commonwealth v. Aston, 26 Lanc. L. Rev. 322 (Pa. C.P. 1909). *But see* Commonwealth v. Thompson, 381 Pa. 299, 113 A.2d 274 (1955). The intoxication defense presents a special problem in cases of felony murder. While it is settled that the intoxication of the defendant is irrelevant to the charge of (felony) murder, it remains relevant, at least logically, to the question of whether the defendant was capable of forming the specific intent required in the felony charge, as, for example, in the case of robbery. It is not clear whether Pennsylvania courts acknowledge the distinction. *See* Commonwealth v. Hardy and Commonwealth v. Thompson, *supra*. *See also* B. LAUB, PENNSYLVANIA TRIAL GUIDE, § 195 at 372 n.24 (1959). At least some courts in other jurisdictions make a point of separating the relevant from the irrelevant purposes of the evidence of intoxication in such cases. People v. Koerber, 244 N.Y. 147, 155 N.E. 79 (1926).

51. Commonwealth v. Thompson, 381 Pa. 299, 113 A.2d 274 (1955); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949), *cert. denied*, 338 U.S. 862 (1949), *reh. denied*, 338 U.S. 888 (1949).

52. Commonwealth v. Farrow, 382 Pa. 61, 114 A.2d 170 (1955); Commonwealth v. McMurray, 198 Pa. 51, 47 A. 952 (1901); Nevling v. Commonwealth, 98 Pa. 322 (1881).

53. 10 Pa. Super. 651 (1899).

have forced upon the defendant an affirmative defense resting on the contention that the defendant had been too drunk to have been capable of forming an intent to steal. In affirming, the Pennsylvania Superior Court remarked:

> The complaint is not that there was error in the statement of the law, but that because defendant's counsel did not in his address to the jury assert that drunkenness was an excuse for crime, simply arguing that the defendant was so drunk that he did not know that he had possession of the stolen property, the charge of the court ought to have been confined to the bearing of the evidence upon that one fact. The evidence was before the jury for all purposes, and it was not error for the court to instruct the jury as to the effect of all the facts . . . upon the question of the guilt of the defendant.[54]

The burden of proof was, of course, placed on the defendant.[55] The decision in *Ault* seems almost antipodal to the decision in *M'Fall,* since the defendant in the former was apparently forbidden to pursue the line of defense permitted in the latter. Perhaps the court in *Ault* felt that a defense based on asserted unawareness of ownership went more to the question of capacity to form an intent to steal than to the question of actual intent.

If the defense of intoxication got off to a rather ambiguous start in non-homicide cases, things appear to have gotten no better, at least if consistency is any criterion. The defense has been accepted in cases of assault with intent to ravish,[56] robbery,[57] burglary,[58] carrying a concealed weapon,[59] and criminal fraud.[60] Some lower courts give an insanity charge in terms of the actor's ability to distinguish right from wrong,[61] while other lower courts simply won't allow the defense at all, even to specific intent crimes such as robbery,[62] receiving,[63] or obstructing an officer.[64] Intoxication is not a defense to assault and battery[65] nor to voluntary manslaughter[66] in Pennsylvania.[67]

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54. *Id.* at 657.
55. He was convicted. Whether the defendant was prejudiced by the line of defense he was apparently forced to pursue is problematic.
56. Commonwealth v. Heatter, 177 Pa. Super. 374, 111 A.2d 371 (1955).
57. Commonwealth v. Hart, 101 Pitts. L.J. 449 (Pa. C.P. 1953).
58. Commonwealth v. Bell, 189 Pa. Super. 389 (1959); Commonwealth v. Silverman, 8 Bucks 238 (Pa. C.P. 1958).
59. Commonwealth v. Hart, 101 Pitts. L.J. 449 (Pa. C.P. 1953).
60. Commonwealth *ex rel.* Dunbar v. Keenan, 196 Pa. Super. 592, 176 A.2d 135 (1962), *cert. denied,* 371 U.S. 839 (1963).
61. Commonwealth v. Silverman, 8 Bucks 238 (Pa. C.P. 1958).
62. Commonwealth v. Trowbridge, 13 Beav. 251 (Pa. C.P. 1951).
63. *Id.*
64. Commonwealth v. Spega, 19 Beav. 11 (Pa. C.P. 1957).
65. Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1967) (dictum).
66. Commonwealth v. Ingram, 440 Pa. 239, 270 A.2d 190 (1970); Commonwealth v. Brown, 436 Pa. 423, 260 A.2d 742 (1970); Commonwealth v. Reid, 432 Pa. 319, 247 A.2d 783 (1968); Commonwealth v. Walters, 431 Pa. 74, 244 A.2d 757 (1968).
67. While this article focuses on the history of the intoxication defense

II. Analysis of the Defense in Pennsylvania

It has been observed in the preceding sketch of the history of the intoxication defense in Pennsylvania that there appear to be no contemporary appellate cases in which the defense was raised only as an "ordinary" defense; that is, there are no cases like *M'Fall* in which evidence of intoxication was presented simply for the purpose of negativing (other than by proving incapacity for forming an intent) an element of the offense. In all of the twentieth-century appellate cases the intoxication defense has apparently been addressed to the issue of whether or not the defendant had possessed the capacity to form the required intent. The distinction between the two different uses of evidence of intoxication is important for several reasons. First, it seems a logically necessary conclusion that a greater degree of intoxication is required in order to find that a defendant was incapable of forming an intent than is required to find that he had not in fact formed an intent.[68] In the factual context of *M'Fall*,[69] for example, evidence of the defendant's intoxication, along with the other data surrounding the homicide, lent some credence to his contention that the killing was the unintended offspring of impulse and circumstance. M'Fall was probably capable of forming an intent to kill; the question was, had he done so in fact? If juries are always told, in every factual context, and in every line of defense, that evidence of intoxication, to be of any value to the accused, must be of such a degree that the defendant was incapable of forming an intent, then the effect on the triers of fact may be to obscure or nullify intoxication's evidentiary value as tending to negative an element of the offense. Second, it is gen-

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in Pennsylvania, it does not appear that either the problems or the issues have been different in other jurisdictions. Of course, the issues have not been resolved uniformly. A few jurisdictions don't permit the defense at all, while others have allowed it to extend further. Some of the same confusion apparent in the Pennsylvania law seems to have shrouded the progress of the defense everywhere. *See, e.g.*, Annot., 12 A.L.R. 846 (1921); Annot., 8 A.L.R.3d 1236 (1966); A. Harno, Cases and Materials on Criminal Law and Procedure 170-85 (4th ed. 1957); Note, *Intoxication as a Criminal Defense*, 55 Col. L. Rev. 1210 (1955).

68. Medical evidence seems to support the conclusion that only large amounts of alcohol render a drinker unconscious of his activity. The effects of ordinary intoxication not extreme in degree seem to be first a release from inhibition, and second a dulling of perceptions. In a state of ordinary intoxication the drinker often exhibits diminished self-control, outbursts of passion, poor coordination, irresponsible behavior, and lack of will power. Extreme intoxication, however, leads to states of stupor and unconsciousness like those of ether and chloroform amnesia. 1 Cyclopedia of Medicine and Surgery 270-71 (1958); 3 R. Gray, Attorney's Textbook of Medicine, ch. 59A at 59A-1 to 59A-7 (1971).

69. *See* text following note 7 *supra*.

erally recognized that alcohol, even in moderate quantities, dulls perception and reaction.[70] What would appear to be sufficient time or opportunity to deliberate in the case of a sober man may be insufficient in the case of an inebriate. Intoxication in this context is relevant to the question whether the outward appearance of events should not be modified by taking the defendant's condition into account, merely as evidence that (despite appearances) he had not in fact formed an intent. In close cases, evidence of intoxication may raise a reasonable doubt. Third, in Pennsylvania, as in many jurisdictions, when it is the defendant's capacity to form an intent which is in issue, the defense becomes affirmative,[71] and the burden of proof falls upon the accused. When capacity is really the issue, this distribution of burdens does not seem unfair.[72] But when evidence of intoxication is offered only to negative an element of the offense, then, of course, the burden should remain upon the prosecution throughout.

The reason for the absence of modern appellate-level cases in which evidence of intoxication was adduced only for the purpose of negativing an element of the offense (*i.e.*, as an ordinary defense) is not clear. Cases in which the distinction was apparently recognized were not uncommon in the last century.[73] Perhaps those

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70. *See* note 68 *supra.*

71. Commonwealth v. Barnosky, 436 Pa. 59, 258 A.2d 512 (1969); Commonwealth v. Chapman, 359 Pa. 164, 58 A.2d 433 (1948); Commonwealth v. Iacobino, 319 Pa. 65, 178 A. 823 (1935).

72. It is not clear whether, in light of the opinion in Commonwealth v. Vogel, 440 Pa. 1, 268 A.2d 89 (1970), the burden of proof of insanity still rests upon the defendant in Pennsylvania. *But see* Commonwealth v. Zlatovich, 440 Pa. 388, 269 A.2d 469 (1970). Whatever change *Vogel* may have made in the law, there is no *a priori* reason to suppose that it will be extended to cases for voluntary intoxication where the defendant's capacity to form an intent is in issue. In the first place, there is the factor of voluntariness. Unlike insane persons, inebriates (except possibly chronic alcoholics) have some latitude of choice about the condition into which they put themselves. Secondly, insanity, at least as contrasted with intoxication, is a "settled" mental disease or defect, whereas intoxication (short of chronic alcoholism) is only a "temporary" mental aberration. Third, insanity may be established either in terms of an actor's inability to know what he is doing, or in terms of his inability to distinguish the wrongness of the act. The criteria of sufficient intoxication, however, may be different, since the ability to distinguish right from wrong may be affected even at early stages of intoxication. The Pennsylvania Supreme Court has recently held that the defenses of intoxication and insanity are distinct. Commonwealth v. Ingram, 440 Pa. 236, 270 A.2d 190 (1970). In Parts III and IV of this paper most of the above distinctions will be discussed and rejected. Nonetheless, there may be other strong arguments for refusing to remove the burden of proof from the defendant in the intoxication defense. In the first place, an actor who has rendered himself insane or unconscious of his acts through intoxication, whether from a "settled" condition or not, has reached his state of irresponsibility by a clearly dissolute and antisocial path, a stigma by no means identifiable with many insane defendants. Secondly, considering the frequency of intoxication-related crimes and the possibility of fraud in the defense, it may be well to keep the burden on the defendant. Finally, in regard to the problem of proof or disproof, it seems more logical to have the defendant prove intoxication than to require the state to prove sobriety.

73. *See* Commonwealth v. McMillan, 144 Pa. 610, 22 A. 1029 (1891);

trials in which intoxication is used only as an ordinary defense produce no problems worthy of appellate notice. Or perhaps defendants like M'Fall are no longer charged with first-degree murder. On the other hand, there is some evidence that the distinction has been lost sight of.[74] If this is so, it is not surprising, considering the factual contexts in which the defense is usually raised in contemporary cases. Where the outward facts strongly indicate prepense, certainly the defense will be of little use if courts relate the evidence of intoxication only to the likelihood that an act was done impulsively, or in heat of passion, etc. The logical relevance of intoxication, and the best line of defense in such situations, would appear to lie in attempting to convince the jury that, notwithstanding his apparent conduct, from the time he formed his intent to the time he acted, the defendant was too drunk to appreciate what he was doing. Since the vast majority of the modern cases arise in such factual contexts,[75] perhaps defense lawyers as well as courts have come to think of intoxication primarily as an affirmative defense.

There is no way of ascertaining whether in fact a sort of single-mindedness has developed concerning the intoxication defense, nor is there any way of determining whether some defendants may be materially prejudiced by intoxication defenses based upon asserted lack of capacity to form an intent. Yet there are some situations in which it appears that it might have been better for defendants to have avoided the affirmative branch of the defense, especially since it carries with it the burden of persuasion. In the case of *Commonwealth v. Ault*[76] it has been observed that the defendant was apparently forced to take up the affirmative defense, even though he attempted to get the evidence before the jury only to negative the element of specific intent in larceny (the intent to deprive indefinitely). In *Ault* the defendant contended that he was unaware that he had taken property not his own. Perhaps the defendant wished to say that he had mistaken the ownership, or even that he simply took the property without any particular

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Warren v. Commonwealth, 37 Pa. 45 (1860); Kelly v. Commonwealth, 1 Grant 484 (Pa. 1858); Pennsylvania v. M'Fall, Add. 255 (Pa. 1794); Commonwealth v. Ault, 10 Pa. Super. 651 (1899); Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868); Commonwealth v. Perrier, 3 Phila. 229 (Pa. C.P. 1858).

74. *See* notes 45, 46 and 54 *supra* and accompanying text. The distinction has been clearly made by Professor Williams, G. WILLIAMS, CRIMINAL LAW 568-73 (2d ed. 1961), and by Professor Perkins, R. PERKINS, CRIMINAL LAW 903 (1969).

75. *See* note 33 *supra.*

76. 10 Pa. Super. 651 (1899).

intent. Whatever the defense strategy, and however unlikely to succeed, it does not appear that the court was justified in forcing the defendant to take up an affirmative burden. Interestingly, *Ault* seems to be the last Pennsylvania appellate case in which an attempt was made (at least explicitly) to pursue the affirmative branch of the defense. There have been cases since *Ault* in which it appears that the affirmative defense might better have been avoided. In *Commonwealth v. Brent*,[77] for example, the defendant got into a fight with the deceased while they were drinking. The victim made some offensive remark, the defendant objected, they quarrelled, and the defendant shot and killed the victim. There was no evidence of pre-existing motive, grudge, or threat, and the killing was "quick." The defendant requested an instruction that the burden of proof of first-degree murder rested with the Commonwealth. This was refused by the trial court, and the jury was instructed that the defendant had the burden of proof of sufficient intoxication to render him incapable of forming a deliberate, premeditated intent to kill. The trial court's charge was upheld on appeal. Again, it appears that a defendant was forced to resort to an affirmative defense when an ordinary defense would have been proper.

Another instance in which the ordinary branch of the defense may be advisable is that in which mistake is asserted, or self-defense. For example, in *Commonwealth v. Brabham*[78] the defendant urged both self-defense and intoxication as defenses. The question of whether there had in fact been a necessity for self-defense was resolved against the defendant. Yet in such cases where both self-defense and intoxication arise together,[79] it might be well to plead only that the defendant mistook (because of intoxication) the necessity of self-defense, not as an affirmative defense, but simply as evidence negativing the element of premeditation. But in *Brabham* the evidence of intoxication was releated to the defendant's capacity to form an intent. It seems to be well recognized that other "affirmative" defenses, such as mistake, can also be used as ordinary defenses, whereas the same duality appears to have escaped wide notice in the case of intoxication.[80]

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77. 233 Pa. 381, 82 A. 469 (1912).

78. 433 Pa. 491, 252 A.2d 378 (1969).

79. *See, e.g.*, Commonwealth v. McGowan, 189 Pa. 641, 42 A. 365 (1899); Commonwealth v. Platt, 11 Phila. 415, 421 (Pa. C.P. 1876).

80. *See, e.g.*, LEVIN, LEVIN, & LEVIN, SUMMARY OF PENNSYLVANIA JURISPRUDENCE, CRIMINAL LAW, § 102 (1955):

> Where the mistake of fact upon which is based a privilege is not based upon reasonable grounds, the defendant may not assert it as an absolute defense even though it be bona fide. It may nevertheless be a relevant factor, in reducing the grade of offense by negating the element of malice.

Id. at 89. On the other hand, this distinction is not made in the section dealing with evidence of intoxication, which section appears, along with those on infancy and insanity, under the rubric, *Defenses Involving Incapacity to Have Mens Rea. Id.* at 55 *et seq.* *See* R. PERKINS, CRIMINAL LAW 903 (1969).

Turning to the affirmative side of the defense, the question immediately arises: What degree of intoxication is sufficient under the modern rule to prove (by a preponderance of the evidence) that the defendant was unable to form a design with deliberation and premeditation, and to prove that he was incapable of judging properly the natural consequences of his acts? Further, how is such a condition to be proved? The Pennsylvania Supreme Court has long since abandoned the language in *Jones v. Commonwealth*,[81] where, in substance, an insanity test was given, and a sufficient degree of intoxication was said to be one which rendered the defendant unconscious on the nature and character of his own purposes, and incapable of resisting wrong impulses. The Pennsylvania Supreme Court has recently iterated the warning that the defenses of intoxication and insanity are separate.[82] Whether this warning refers to the legal results of the defenses (exoneration as opposed to "reduction" in grade of the offense), or to the evidential tests for criminal responsibility is not clear.

There is some evidence indicating that modern Pennsylvania courts have in view a defendant who is (was) totally unconscious of his acts, a defendant whose volition has been completely cut off from cognition. In the first place, Pennsylvania, like the majority of jurisdictions, does not acknowledge the defense of diminished responsibility in criminal cases.[83] It is unlikely that the courts mean to make an exception in the case of inebriates, who are perhaps the least sympathetic class of defendants suffering from an impaired or diminished capacity for conforming their conduct to the law. Consequently, it appears that mere liberation from restraint, freedom from inhibition, and dulled awareness do not represent sufficient degrees of intoxication under the modern Pennsylvania rule. Second, until the modern rule had solidified into its present form, courts used language which strongly indicates that only defendants totally unconscious of their acts were envisioned as coming within the ambit of the defense.[84] Certainly in terms of

81. 75 Pa. 403 (1874). *See* text accompanying note 32 *supra*.
82. Commonwealth v. Ingram, 440 Pa. 239, 270 A.2d 190 (1970).
83. The concept of diminished responsibility seems to rest upon the notion that acts are less culpable when the defendant acted with a "reduced" capacity to form a required criminal intent. *See* J. HALL & G. MUELLER, CRIMINAL LAW AND PROCEDURE, 532-39 (2d ed. 1965).
84. Other verbal formulations of the sufficiency test are: intoxication which "subverts conscious purpose," Commonwealth v. Farrow, 382 Pa. 61, 114 A.2d 170 (1955); Commonwealth v. Chapman, 359 Pa. 164, 58 A.2d 433 (1948); Commonwealth v. Kline, 341 Pa. 238, 19 A.2d 59 (1941). A mind "no longer capable of acting consciously," Commonwealth v. McManus, 143 Pa. 64, 21 A. 1018 (1891). A mind "wholly unconscious" of its acts, Meyers v. Commonwealth, 83 Pa. 131 (1876). A mind "thoroughly un-

the problem of proof of intoxication, the standard appears to have been set very high. Consider, for example, the facts in *Commonwealth v. Chapman*.[85] There the defendant and many of his blood relatives had long histories of alcoholism and insanity. The defendant killed his wife of four months, with whom he appeared to have been on good terms at least, after he had behaved in an altogether bizarre manner. There was no evidence of prepense in the killing, even a good deal of evidence to the contrary. After he had killed his wife, the defendant killed their pet dog, placed it in one of his wife's arms, and passed out. He was ultimately discovered (a period of wakefulness intervening) unconscious on the floor in the other arm of his lifeless wife. There was ample evidence that the defendant, immediately prior to the killing, had ingested a large quantity of alcohol. Nonetheless, on appeal the court upheld a conviction for first-degree murder (over two strong dissents), stating that the evidence was insufficient to establish either lack of capacity to deliberate and premeditate, or inability to judge the natural consequences of an act. What additional evidence would have sufficed is an interesting question. Parenthetically, it may be remarked that if total unconsciousness is the standard, then it is difficult to perceive what the distinctions are between the test for insanity and the test for intoxication sufficient in degree to provide a defense.[86]

On the other side, there is also evidence that Pennsylvania courts today do not mean unconsciousness when they charge juries on the intoxication defense. In the first place, reference to the word "consciousness" has been deleted from the modern rule, and the modifier "properly" is sometimes used to qualify the criterion of intoxication stated in terms of the defendant's power to judge the consequences of his acts.[87] Second, the Pennsylvania Supreme Court has recently held that "unconsciousness" may be a defense only in cases of epilepsy, physical disabilities such as those resulting from blows on the head, and somnambulism.[88] Perhaps it can be concluded only that it is not at all clear what state of mind, or degree of intoxication, must be found by the trier of fact before the defendant has carried his burden. The modern Pennsylvania rule appears to be too vague and too general to furnish judges and juries with sufficient guidance when they consider evidence of intoxi-

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hinged," Commonwealth v. Woodley, 166 Pa. 463, 31 A. 202 (1895). "Unconscious of what he was doing," Nevling v. Commonwealth, 98 Pa. 322 (1881).

85. 359 Pa. 164, 58 A.2d 433 (1948).

86. Perhaps, since insanity may consist of the absence of the power to distinguish the wrongness of an act, as well as unconsciousness of conduct, the difference is that the intoxication defense includes only the latter criterion, although unconsciousness would certainly subsume an inability to distinguish right from wrong.

87. *See, e.g.*, Commonwealth v. Ingram, 440 Pa. 239, 270 A.2d 190 (1970).

88. Commonwealth v. Crosby, Pa. , 279 A.2d 73 (1971).

cation. That there is a certain element of danger in this lack of specificity and direction was noted several decades ago:

> The drunken man performs precisely the same acts that the sober man does, but since murder has been divided into degrees, the courts, instead of permitting the juries to decide on the facts as they exist, place upon them the impossible test of determining the mental state of the accused at the time of committing the crime. . . . If he is under the influence of alcohol, the court does not permit the jury to decide on the facts . . . which show all the steps necessary to constitute first-degree murder, but requires them to speculate as to whether or not he had mentality enough knowingly to do the acts which he did, with nothing to guide them except evidence that he was intoxicated. It is submitted that this speculation has no place in the law.
> . . .
> . . . .
> The unfortunate result of this is that juries are required to judge, not by the course of action and the results, as in the case of other men, but by mere speculation as to the possibilities of action of a drunken brain. This furnishes no sure guide, and in fact, in many cases, establishes a different rule of liability for the drunken man than for the sober one. . . .[89]

It is, of course, purely argumentative whether the modern Pennsylvania law on intoxication as a defense has created a "special rule" for intoxicated criminals, especially in light of cases like *Chapman.*

It is submitted that, whatever state of mind is currently envisioned by Pennsylvania courts as falling within the boundaries of the modern rule on intoxication, where the defendant's capacity to form a criminal intent is the issue, complete unconsciousness of conduct should be the criterion in Pennsylvania. Only that degree of intoxication which so completely severs an actor's conduct from his power to think, and leaves him beyond any possibility of self-restraint and understanding should be sufficient to relieve a defendant from any quota of criminal responsibility. A lesser standard would amount to the creation of special rules for inebriates. In those jurisdictions which subscribe to the defense of diminished responsibility, there is something to be said for permitting an affirmative defense based on less than full insanity or complete unconsciousness of conduct. If other individual disabilities, defects, susceptibilities, or pecularities are to be given relevance in determining legal responsibility, measured by an actor's capacity to form a criminal intent, then perhaps intoxication not amounting

89. Annot., 12 A.L.R. 846, 862-63, 883 (1921).

to unconsciousness of conduct should be a factor in the equation of guilt. But where, as in Pennsylvania, the principle of diminished responsibility is not acknowledged, it seems both unwise and unfair to create a special rule for intoxicated offenders. Unfair because, unlike congenital stupidity, simple ignorance, highly excitable temperament or deprived living conditons, there is a definite element of voluntariness in the act of becoming intoxicated. Unwise because public discipline and morale would be adversely affected by any solicitude shown for an excess often as antisocial in its effects as it is frequent in recurrence. There does seem to be a real contest in modern law and jurisprudence between the advocates of more subjective standards of mens rea (who apparently feel that guilt is relative to individual mentality)[90] and the advocates of more objective standards of culpability (who stress the social necessity of conformance to fixed standards).[91] Wherever the truth may lie, it does not seem good policy to confine or even begin the process of allowing for diminished criminal responsibility with inebriates.

III. Criticism of the Present Law; the Model Penal Code

One of the most persistent and articulate critics of the present law on intoxication as a defense is Professor Jerome Hall, [92] who has suggested that the issue in cases where the defense is raised should be whether the defendant's prior experience with alcohol should have alerted him to the possibility that he might commit a criminal act while intoxicated. This conclusion follows both from certain premises which Hall develops in the context of the criminal law in general, as well as from some observations about the manner in which contemporary courts actually treat the defense of intoxication.

First, Hall does not approve of the division of crimes into categories of specific and general intent because, he asserts, all crimes require a positive criminal intent, and any criminal charge (whether of a crime of general or specific intent) can be refuted by

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90. *See* J. Hall, General Principles of Criminal Law (1960).

> The principle of *mens rea* . . . implies the personal guilt of normal adult offenders. . . . [B]oth the offender's *mens rea* and his motives must be considered in appraising his moral culpability. . . .

Id. at 146.

91. *See* Holmes, The Common Law 1-76 (1st ed. 1881).

> If punishment stood on the moral grounds which are proposed for it, the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and all the other defects which are most marked in the criminal classes. I do not say that they should not be. . . . I do not say that the criminal law does more good than harm. I only say that it is not enacted or administered on that theory.

Id. at 45.

92. *See* J. Hall, General Principles of Criminal Law 529-57 (2d ed. 1960) [hereinafter cited as Hall]; Hall, *Intoxication and Criminal Responsibility*, 53 Harv. L. Rev. 1045 (1944).

proving complete absence of criminal purpose.[93] Whatever may be the merits of this assertion, it remains true that some crimes (first-degree murder, larceny, burglary, robbery, etc.) are so defined in present law that an element of the offense is a specific purpose or intent to accomplish the particular criminal result. In such cases, the distinction between general and specific intent is important, because where the evidence of intoxication is adduced, not to prove lack of capacity, but only to negative in some other fashion the element of specific intent, the defendant should be allowed to proceed without the burden of an affirmative defense. In crimes not requiring a specific intent, there being no element which evidence of intoxication can negative,[94] the defense must of necessity become affirmative, and the defendant may not improperly be given the burden of persuasion. This distinction may appear only "technically persuasive,"[95] but failure to observe it can result in

93. The merits of this argument are not only beyond the scope of this paper, but also beyond the competence of the writer. It does appear, however, that Professor Hall's thesis derives most of its support from the relatively internal, or subjective standard which he sets up for mens rea. *Compare* HOLMES, THE COMMON LAW 39-76 (1st ed. 1881) *with* HALL 70-212. Perhaps the distinction between crimes of general intent and crimes of specific intent is that in the former, once the acts are proved, there arises a presumption of criminal intent (where no "exceptional fact or excuse" takes the acts out of the rule), as in murder, assault, rape, etc. HOLMES at 63. Looked at from the other side, some crimes may not be proved or may not rise to a higher level, unless the acts are accompanied by a "particular state of feeling," as in first-degree murder or malicious mischief. *Id. loc. cit.* Or perhaps, in the case of another class of crimes, such as larceny and burglary, the element of specific intent is an "index to the external event" which will probably happen. *Id.* at 72. It may be that Hall's thesis disagrees with such views of the criminal act, or that it denies that they were ever valid.

94. Evidence of intoxication could also be used in conjunction with other evidence to show that an act was not criminal, but accidental (except, of course, where negligence is sufficient to meet the culpability requirement)—to show that, in Holmes' phrase, the dog was not kicked but stumbled over. HOLMES, THE COMMON LAW 3 (1st ed. 1881). *See* G. WILLIAMS, CRIMINAL LAW 568-70 (2d ed. 1961). Williams also maintains that intoxication can be used to prove mistake (*e.g.*, that the dog was kicked, but under a mistaken provocation). Whatever may be the case in Great Britain, Pennsylvania apparently adheres to the view that mistake, to be an affirmative defense, must be both honest and reasonable in the case of general intent crimes. *See* LEVIN, LEVIN, & LEVIN, SUMMARY OF PENNSYLVANIA JURISPRUDENCE, CRIMINAL LAW, §§ 101-03 (1955); R. PERKINS, CRIMINAL LAW 903 (1969). Consequently, it is doubtful that, were the issue raised, intoxication would be held relevant to prove mistake as an affirmative (complete) defense, since the objective standard of reasonableness is not likely to include intoxication. If, as is apparently the case in England, the only question were the reasonableness of the mistake from the (intoxicated) defendant's point of view, then perhaps intoxication would be admissible to prove mistake affirmatively.

95. HALL at 533.

prejudice to defendants, especially since the allocation of the burden of proof may, as in Pennsylvania, depend upon the observance.

Second, Hall derives his rule on the intoxication defense partly from some observations about the manner in which the defense is treated by modern courts. He notes the extreme difficulty in establishing a sufficient degree of intoxication to qualify under modern tests like Pennsylvania's. Courts appear uniformly adamant against recognizing even severe states of intoxication as sufficiently exculpatory.[96] While Hall makes it plain that, when the actor's capacity to form a criminal intent is in issue, he is concerned only with extreme states of intoxication, he does not say whether or not he has in mind complete unconsciousness of conduct:

> What we have to deal with is not incapacity to perform simple acts or such an obliteration of cognitive functions as to exclude any degree of purposive conduct, but instead a severe blunting of the capacity to understand the moral quality of the act in issue, combined with a drastic lapse of inhibition. As has been suggested, this closely resembles, if it is not identical with, insanity.[97]

Some of the conclusory language seems to indicate a state of unconsciousness, but the test proposed resembles the *Jones* test[98] which has been abandoned or rejected in Pennsylvania. If Hall's rule envisions defendants whose states of intoxication had left them less than completely unconscious of their acts, then it is submitted that, where capacity to form an intent is the issue, the rule is not harmonious with Pennsylvania law, and for the reasons enumerated above[99] it should not be applied in Pennsylvania.

Although it is felt that Hall's rule on the intoxication defense is not appropriate for Pennsylvania, he makes another point which does apply to the law of the Commonwealth. Hall's rejection of the distinction between general and specific intent has led him to the conclusion that intoxication should be a defense to all crimes, except that when a defendant's prior experience forewarns him of his dangerous condition when intoxicated, he may not assert the defense to a crime resting on criminal negligence.[100] It has been submitted that the distinction between general and specific intent should be heeded in cases where a defendant does not base his defense upon asserted lack of capacity. However, when capacity is in issue, and complete unconsciousness of conduct is the criterion of sufficient intoxication, the defense should be available to all crimes except those for which the act of intoxication itself is, for reasons

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96. *Id.* at 541-44. Pennsylvania appears to fit Hall's general description. *See* the discussion of the *Chapman* case, at text following note 85 *supra.*

97. HALL at 554 (footnotes omitted).

98. *See* text accompanying note 32 *supra.*

99. *See* notes 90 and 91 *supra* and accompanying text.

100. HALL at 557.

of public policy, made an element of the offense,[101] or where mere negligence is the ratio of culpability.[102] Finally, in regard to Hall's assertion that the determining factor in establishing responsibility for a criminal act committed while intoxicated should be the defendant's personal experience with alcohol, it is submitted that (cases of pathological intoxication aside) such a rule ignores the common experience of everyone with the tendencies of inebriation. It does not seem too great an imposition upon even minimal intelligence to hold everyone to a knowledge of the putative effects of intoxication.[103] No doubt prior experience with alcohol has some relevance to assessment of punishment, either as an aggravating or as a mitigating factor, and in Pennsylvania evidence bearing on the point seems clearly admissible for that purpose.[104]

Another important formulation of the rule on intoxication as

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101. As for example in the crime of driving while under the influence. The boundary between intoxication as an offense and as a defense seems to be one which can only be established as a matter of public policy. If intoxication were to be a defense to all crimes, then of course we would be left with the paradox that intoxication could become a defense to drunken driving. Sometimes public policy seems to require that a "hard line" be taken, as in cases of homicide by motor vehicle while intoxicated. In such cases perhaps the proper inquiry should be whether or not the defendant should have foreseen the possibility that his inebriation would lead to reckless conduct. *See* Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957). Such situations are not confined to homicides, assaults, and destruction of property. An interesting Pennsylvania case is Pennsylvania v. Keffer, Add. 290 (Pa. 1795), where the defendant was charged with contempt for becoming intoxicated while serving as a grand juror. The court instructed the jury that both the manner in which the defendant became inebriated and his purpose (if any) in doing so were relevant, because it was held essential to conviction that the defendant had permitted himself to become intoxicated with the purpose of avoiding jury duty. Most of the discussion concerning intoxication and recklessness is tangential to the principal issues in this paper, and despite the interesting questions it raises, it will be avoided.

102. *See* Part IV for justification of this position.

103. *See* Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L. FORUM 1, 15 (1961) [hereinafter cited as PAULSEN]. On the other hand, Judge Lewis apparently shared Professor Hall's views to some extent. Commenting on the rule that intoxication is no excuse for crime, Judge Lewis says:

> This rule may seem harsh, when brought to bear upon an individual whose previous experience has furnished him with no actual knowledge of the destructive tendencies of such stimulus. But there can be no hardship in its application to one whose frequent indulgence has rendered him familiar not only with its effect upon his own brain, but with its dangerous influence in respect to the lives of others. . . .

E. LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 405 (1848).

104. Commonwealth v. Thompson, 381 Pa. 299, 113 A.2d 274 (1955); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949), *cert. denied*, 338 U.S. 862 (1949), *reh. denied*, 338 U.S. 888 (1949).

a defense which provides, by comparison, some perspective on the modern Pennsylvania rule is that embodied in the Model Penal Code prepared by the American Law Institute. The Code has provided the basis for several statutory restatements of the law on the intoxication defense, including a bill which has been introduced in the Pennsylvania legislature.[105] The Code section[106] dealing with the defense reads as follows:

> Section 2.08. Intoxication.
>
> (1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.
>
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.
>
> (3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.
>
> (4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.
>
> (5) Definitions. In this Section unless a different meaning plainly is required:
>
> (a) "intoxication" means a distrubance of mental or physical capacities resulting from the introduction of substances into the body;
>
> (b) "self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;
>
> (c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

The official comments to Section 2.08[107] amplify the general language of the official draft provisions. From the comments it appears that the drafters envision Section 2.08(1) as including those cases in which evidence of intoxication is addressed, not to the issue of capacity to form an intent, but simply to the purpose of

105. Senate Bill No. 455, Session of 1971 (printer's no. 470). The Code has also provided the basis for suggested reform of federal criminal law, including the law on intoxication as a defense. 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 223, 225 (1970).

106. All references to Code sections are to the MODEL PENAL CODE PROPOSED OFFICIAL DRAFT (1962).

107. MODEL PENAL CODE TENTATIVE DRAFT No. 9, 1 (1959). All references to comments will be to "TENTATIVE DRAFT No. 9."

negativing an element of the offense by other means.[108] That is, Section 2.08(1) is the means by which evidence of intoxication adduced under the ordinary branch of the defense is to reach the jury.[109]

Turning to the affirmative branch of the defense, where capacity is the basis of the defense, the Code does not directly describe that state or degree of intoxication sufficient to establish lack of capacity under the Code. There is reason to believe, however, that unconsciousness of conduct is the implicit standard.[110] It is not clear why the drafters have gone no further in describing the required degree of intoxication than in remarking that it is a "complex issue."[111] Perhaps it was considered advisable to leave the resolution of the problem to each jurisdiction.

Whatever the criterion of sufficient intoxication under the Code, it is clear that lack of capacity to form a criminal intent can be a defense only to specific intent crimes. The Code does not use the terms "specific" and "general" intent, but it achieves the same dichotomy through the concepts of purpose, knowledge and recklessness.[112] As the comments to Section 2.08 make clear, intoxica-

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108. TENTATIVE DRAFT No. 9 at 7-9.

> The first . . . question [is] whether intoxication ought to be accorded a significance that is entirely co-extensive with its relevance to disprove purpose or knowledge, when they are the requisite mental elements of a specific crime. We submit that the answer clearly ought to be in the affirmative; that when the definition of a crime or a degree thereof requires proof of such a state of mind, the legal policy involved will almost certainly obtain whether or not the absence of purpose or knowledge is due to the actor's self-induced intoxication or to some other cause.

Id. at 7.

109. "Element of the offense" is defined in § 1.13. For unexplained reasons this section has been omitted from the Pennsylvania bill. Senate Bill No. 455, Session of 1971 (printer's no. 470).

110. *See* TENTATIVE DRAFT No. 9 at 4 n.4; PAULSEN at 7. (Prof. Paulsen was a special consultant on the Code's intoxication formulation).

111. TENTATIVE DRAFT No. 9 at 4.

112. Section 2.02 defines the general requirements of culpability, and provides in part:

> Section 2.02. General Requirements of Culpability.
>
> (1) *Minimum Requirements of Culpability.* Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
>
> (2) *Kinds of Culpability Defined.*
>
> (a) *Purposely.*
>
> A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

tion resulting in incapacity to form a criminal intent will be a defense only to crimes requiring purpose or knowledge as an element of offense,[113] that is, to specific intent crimes. This result is reached because, say the drafters, general intent crimes rest fundamentally upon recklessness as the ratio of culpability, and the act of becoming intoxicated may be equated with recklessness.[114] It is suggested that the equation of "general intent" with recklessness is questionable;[115] or at least recklessness is only one type of general intent, and a type which leads to special problems of its own.[116] In any event, regardless of the accuracy of the equation of general intent and recklessness, it will be argued in Part IV of this paper that where complete unconsciousness of conduct is the standard of intoxication and capacity to form a criminal intent is the issue, the defense should also be available (at least to some extent) to crimes of general intent. Under the Code, only cases of "settled" insanity[117] resulting from intoxication will provide defenses to crimes of general intent, and in such cases the defense will be co-extensive with the insanity defense (*i.e.*, it will be complete).[118]

It is unclear from the Code whether the intoxication defense will or will not be affirmative either in some or in all cases. Be-

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(b) *Knowingly.*

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) *Recklessly.*

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) *Negligently.*

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

The word "intentionally" has replaced "purposely" in the Pennsylvania bill. Senate Bill No. 455, Session of 1971 (printer's no. 470) at § 302.

113. TENTATIVE DRAFT No. 9 at 2-9. *See* PAULSEN at 9.

114. TENTATIVE DRAFT No. 9 at 8-9; PAULSEN at 13-15.

115. *See* note 93 *supra.*

116. *See* note 101 *supra.*

117. Such as delirium tremens and alcoholic hallucinosis. PAULSEN at 21-23; TENTATIVE DRAFT No. 9 at 9-10.

118. TENTATIVE DRAFT No. 9 at 9; PAULSEN at 21-23.

cause the Code treats both the ordinary and the affirmative branches of the defense under the same provision, there cannot, of course, be any distinction between the two in terms of allocating the burden of proof. Since pathological and involuntary intoxication are explicitly treated as affirmative defenses in Section 2.08(4), there is an implication that the defense under Section 2.08(1) is not. Further, the Code in general,[119] and Section 1.12 (treating affirmative defenses)[120] in particular, are heavily biased against giving

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119. *See* comments to § 1.13, TENTATIVE DRAFT No. 4, 108-118 (now § 1.12).

120. Section 1.12 deals with affirmative defenses and provides as follows:

> Section 1.12. Proof Beyond a Reasonable Doubt; Affirmative Defenses; Burden of Proving Fact When Not an Element of an Offense; Presumptions.
>
> (1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.
>
> (2) Subsection (1) of this Section does not:
>
> (a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or
>
> (b) apply to any defense which the Code or another statute plainly requires the defendant to prove by a preponderance of evidence.
>
> (3) A ground of defense is affirmative, within the meaning of Subsection (2)(a) of this Section, when:
>
> (a) it arises under a section of the Code which so provides; or
>
> (b) it relates to an offense defined by a statute other than the Code and such statute so provides; or
>
> (c) it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence.
>
> (4) When the application of the Code depends upon the finding of a fact which is not an element of an offense, unless the Code otherwise provides:
>
> (a) the burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made; and
>
> (b) the fact must be proved to the satisfaction of the Court or jury, as the case may be.
>
> (5) When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences:
>
> (a) when there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and
>
> (b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.
>
> (6) A presumption not established by the Code or inconsistent with it has the consequences otherwise accorded it by law.

This section has been deleted in its entirety from the Pennsylvania bill.

defendants the burden of proof. The most that can be said is that, unless the legislature otherwise provides, defendants probably would not have the burden of proof under the Code. Removal of the burden of proof from defendants certainly seems a desideratum where the defense is not affirmative, but where capacity is the issue, Pennsylvania law clearly puts the onus on the accused, and it has been suggested that there may be strong arguments for keeping it there.[121]

IV. Summary and Conclusions

Summary

The defense of intoxication entered Pennsylvania law, as it entered English law, under very limited circumstances. Evidence of intoxication was adduced in order to negative the element of premeditation in first-degree murder, as tending to prove that the homicide was the result of passion or impulse, that it was a "quick" killing, partially (at least) inspired by intoxication. Before long, however, the emphasis began to shift from the question whether a specific intent to kill had in fact been formed to the question whether the defendant had been capable of forming a specific intent at all. Once the issue of the defendant's capacity entered the law, courts were in a quandary about how far the defense could extend. The last half of the nineteenth century saw various attempts to equate both the evidentiary test for capacity and the legal result of the defense to the defense of insanity. While it apparently became established that some types of alcohol-related insanity (such as delirium tremens) could provide a complete defense, short of these recognized cases of "settled" insanity, it has finally come to be held that the two defenses are distinct, both in terms of the tests for mental capacity and in terms of the legal results of the defenses. It is now held that, even though the defense is only partial, it is still an affirmative defense, *i.e.* the defendant has the burden of proof of a sufficient degree of intoxication by a preponderance of the evidence.

The present century has seen the apparent abandonment of attempts to use evidence of intoxication as an "ordinary" defense, that is, as evidence merely tending to negative the state's case without raising the issue of capacity to form an intent. The factual contexts in which the defense is raised in contemporary cases may explain the disappearance of the "ordinary" branch of the defense, since today the cases tend to abound with (outward) evidence of premeditation. There is some indication, however, that a few defendants have been forced to take up the affirmative branch of the defense (sometimes over objections) when the ordinary branch

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No alternative section appears to have been substituted. Senate Bill No. 455, Session of 1971 (printer's no. 470).

121. *See* note 72 *supra.*

would have been proper. The modern Pennsylvania rule on intoxication as a defense is a hybrid, reflecting elements and principles evolved during the nascent stage of the affirmative branch of the defense. The defense of intoxication is not available in Pennsylvania to crimes of general intent. But in crimes of specific intent, the contemporary Pennsylvania rule is that, in the case of murder, intoxication sufficient to deprive the mind of the power to form a design with deliberation and premeditation, and to properly judge the natural consequences of an act, may reduce the grade of the murder to murder in the second degree.[122] In non-homicide specific intent crimes, the same test is applied, with appropriate modification, to the question whether the defendant had been incapable of forming the particular (specific) intent required. The burden is upon the defendant to establish a sufficient degree of intoxication by a preponderance of the evidence.

There are no modern cases in which the issue of alcohol-related insanity was raised, but the Pennsylvania Supreme Court has recently held that the defenses of intoxication and insanity are separate. There is no reason to suppose, however, that, at least in cases of "settled" insanity produced by or related to alcohol (such as delirium tremens), the long-established principle of giving the full legal effect of the insanity defense would be repudiated if the issue were raised. Short of recognized cases of "settled" insanity, the defense of intoxication can only be partial, even though intoxication may have rendered the actor entirely unconscious of his own acts, and completely incapable of self-restraint. It is not clear whether a lesser degree of intoxication is sufficient to qualify for the partial defense under the modern rule.

Criticisms of the present law on the intoxication defense center around two principal points. First, some critics feel that the restriction of the defense to specific intent crimes is unwarranted. It is argued that the defense should be available to some general intent crimes, at least to those not resting upon criminal negligence, and excepting those crimes for which the legislature has made the act of becoming intoxicated an element of the offense. Second, some critics contend that the defense should not be affirmative un-

122. The rule is generally stated in terms of lowering the murder to murder in the second degree. But since the murder is presumed to be of the second degree only, and the burden is upon the state to raise the degree, it seems incorrect to speak of reducing it. Rather, it should be said that intoxication may prevent the homicide from rising to murder in the first degree. *See* Commonwealth v. Chapman, 359 Pa. 164, 58 A.2d 433 (1948) (dissenting opinion) (recognizing the distinction, at least where the defendant pleads guilty).

less specifically so designated by the legislature. Finally, critics have also noted the reluctance of courts to recognize cases of alcohol-induced or alcohol-related insanity short of delirium tremens.

Conclusions

Turning first to the "ordinary" branch of the intoxication defense (*i.e.*, to those cases where evidence of intoxication is introduced to negative an element of the offense without getting to the question of the defendant's capacity to form an intent), it has been observed that there appear to be no modern appellate cases in which this branch of the defense was pursued. It is impossible to say whether or not there are or have been defendants who were materially prejudiced by failure to pursue the ordinary branch of the defense, but there are some circumstances in which it would appear better strategy to avoid the affirmative side of the defense, such as quick, impulsive or "passionate" killings where there is no evidence of prior motive, etc.; cases in which intoxication-inspired mistake is claimed, not as an affirmative defense but only as evidence negativing an asserted specific intent (as where mistaken necessity of self-defense, mistaken ownership, or mistaken consent is asserted); cases in which intoxication may supply evidence of lack of a specific criminal intent, as for example the intent to deprive indefinitely or the intent to commit a felony in larceny and burglary.[123] When the ordinary branch of the defense is being pursued, and the defendant is not contending that intoxication had deprived him of the power to form a specific intent, the defense is not affirmative, and the defendant should not be forced to assume the burden of proof. Nor is it necessary to establish the same degree of intoxication required by the affirmative defense where the ordinary side of the defense is relied upon, because states of inebriation not reaching unconsciousness may provide believable evidence of impulse, passion, or mistake. Consequently the defendant should not be forced to meet the more stringent criteria of sufficient intoxication imposed upon the affirmative defense, where lack of capacity to form an intent is in issue. The ordinary side of the intoxication defense can be pursued only where the crime includes an element of specific intent; it has no applicability to general intent crimes.

The affirmative side of the defense presents greater problems than the ordinary side. The intoxication defense properly becomes affirmative where the defendant asserts that intoxication had deprived him of the power to form a (specific) intent. This line of defense is normally pursued where there is abundant outward

123. *See* R. PERKINS, CRIMINAL LAW 903 (1969). *See also* ALCOHOL, SCIENCE AND SOCIETY 148 (Yale Un. Press 1945), wherein Dr. Banay reports on some of the stranger motivations of inebriated burglars and larcenists.

evidence of all of the elements of the crime, including the intent element, and the defendant can only hope to convince the jury that, notwithstanding his conduct, he was unable to judge his acts or appreciate what he was doing. The two principal issues which arise in regard to the affirmative defense are the standard of intoxication sufficient to qualify under the affirmative rule, and the question of whether the affirmative defense should extend to general intent crimes.

It has been suggested that only that degree of intoxication which renders the actor unconscious of his purposes and puts him beyond the possibility of self-restraint through thought, judgment, and reflection, not only in regard to the criminal act, but in regard to everything he does, should be sufficient to establish an incapacity to form a criminal intent.[124] If a lesser standard were set at a level where the actor retains some degree of control over his conduct, then, in Pennsylvania at least, the result would be the establishment of a "special rule" of liability for inebriates which would discriminate against more sympathetic classes of defendants laboring under impaired abilities to conform their conduct to the law.[125] It may be that the "unconsciousness" standard is only coextensive with cases of alcohol-related insanity, or it may be more extensive. Medical science appears to provide no ready answer. But at least courts should be more willing to recognize that intoxication can result in insanity beyond delirium tremens.[126] In the past, courts have tended to insist upon states of intoxication amounting almost to physical immobility before the defendant could carry his burden.[127] Or they have inisted that intoxication, to reach the level of insanity, must have produced a "settled" condition, as in delirium tremens.[128] Both standards seem too harsh. Non-inebriated insane defendants are not required to prove physical immobility, and it is difficult to see why the requirement should be imposed in the case of inebriates. If by "settled," courts mean that the insane condition must have had a respectably long history in the defendant, then the requirement seems both medically unrealistic, and arbitrary. Some states of alcoholic insanity can be

124. *See* Annot., 8 A.L.R.3d 1236, 1263 *et seq.* (1966).
125. *See* notes 90 and 91 *supra* and accompanying text.
126. One popular legal-medical text has enumerated twelve separate psychopathological states caused by alcohol, including hallucinosis, paranoia, brain atrophy, and deterioration of personality and of ethical sense and judgment. 3 R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ch. 59A.40 at 59A-8 (1971).
127. HALL at 533; *see* Annot., 8 A.L.R.3d 1236, 1263 *et seq.* (1966).
128. PAULSEN at 21-23; R. PERKINS, CRIMINAL LAW 906 (1969); Annot., 8 A.L.R.3d 1236, 1265-68 (1966).

reached after a single heavy drinking bout, without a life history of alcoholism.[129] Certainly it is conceivable that an "ordinary" drunk can become unconscious of his conduct without first qualifying as an alcoholic. Further, there seems to be no reason to reward "settled" cases of alcoholism with special treatment over the "ordinary" drunk on a two-day spree. While the alcoholic may have less control over his immediate drinking, he also has had more opportunity, in his lucid moments, to turn himself in for treatment.[130] It is often said that the law will not litigate culpability for the causes of "settled" insanity.[131] It is difficult to understand why the equable countenance of the law should darken when an ordinary drunk tries to set up a defense of temporary alcoholic insanity, only to brighten again when an established alcoholic pleads insanity resulting from prolonged dissipation. If voluntariness in choosing to drink is the criterion, then (unless all alcoholics are held to be insane compulsives from the time they take their first drinks) the only difference between alcoholics and occasional drinkers is the remoteness of the "choice." Even in the case of alcoholics, the defense will succeed only if the defendant was "fortunate" enough to have committed his crime during a seizure of recognized medical standing. Otherwise his defense can only be partial, as in the case of the ordinary drinker. Alcoholics and syphilitics with long histories of dissolute conduct leading to insanity don't appear to present a stronger case for legal tenderness than the "spree" or occasional excessive drinker. Yet the latter type of offender has been denied the affirmative insanity defense because his unconsciousness was only "temporary."[132] Consequently, it is concluded that unconsciousness of conduct should be the standard, regardless of whether or not the resultant condition is distinguished by having achieved medical recognition under some particular psychosis or syndrome, and regardless of whether or not the condition had "settled" into the defendant over a period of time.

Perhaps the most difficult question of all in the intoxication defense is whether or not it should be available to general intent crimes. It is suggested that where complete unconsciousness of

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129. *See* 3 R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE, ch. 59A at 59A-1 (1971); H. HAGGARD & E. JELLINEK, ALCOHOL EXPLORED 163 *et seq.*; 200 *et seq.* (1942).

130. Perkins, distinguishing drunkenness and insanity has said:

> Logic alone might have indicated a different answer because more fault is involved in long-continued overindulgence than in a single debauch, but as it developed the "law takes no notice of the cause of insanity."

R. PERKINS, CRIMINAL LAW 906 (1969). Whereas, the law does notice the cause of "drunkenness," no matter how severe. *See* Annot., 8 A.L.R.3d 1236, 1263-68 (1966).

131. *See* PAULSEN at 21; Annot., 8 A.L.R.3d 1236, 1265-68.

132. *Id.* A concise statement of the position was formulated by Judge Lewis over a century ago. E. LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 403-06 (1848).

conduct is the criterion of intoxication, the affirmative defense should be available, at least to some extent, to general intent crimes. Obviously there is a conflict between the demands of public order and discipline[133] and the requirement of mens rea.[134] Vengeance or retribution, and the necessity of maintaining public order require a "hard line" against alcohol-related crimes, particularly because they recur so frequently, and because everyone should be aware of the potential effects and tendencies of alcohol. On the other hand it has long been recognized that there is a great deal of arbitrariness in allowing the affirmative defense of intoxication only in crimes of specific intent.[135] If an actor has rendered himself completely unconscious of his conduct through intoxication, and the defense is not allowed, then he is being punished, to a large extent, for the act of becoming intoxicated. Since the law is solicitous of conditions of insanity produced by other types of reprehensible conduct, it seems unjustifiable to base liability upon the actor's voluntary act of becoming intoxicated simply because his "choice" was more proximate to the crime than the "choice" of the alcoholic or syphilitic.[136] Finally, there does appear to be some merit in the observation that cool, sober, deliberate criminal acts compare pejoratively to acts performed by a defendant uncon-

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133. Mr. Justice Holmes wrote:

> Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. . . .
>
> . . . .
>
> . . . [Standards of conduct] are not only external . . . but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness.

THE COMMON LAW 48, 50 (1st ed. 1881).

134. Professor Hall has written:

> What penal law now does to a large extent (and what it should do throughout its total range) is to make liability depend upon the actual state of the defendant's mind regarding the relevant facts. . . .

HALL at 165.

135. Well over fifty years ago Dean Trickett remarked:

> It is difficult, however, to perceive why, if the mind be so affected by alcoholic or other stimulants, as to be incapable of intending to kill, it may not also be incapable of intending great bodily harm, or of realizing that the acts done may result in such harm. The cases must be rare, indeed, in which a judge or a juror can rationally say that while X was too drunk to intend the death which his act, in the view of a sober man, would probably cause, he was not too drunk to intend grave bodily harm, or to be in that frame of mind known in the law of homicide as "malice."

2 W. TRICKETT, THE LAW OF CRIMES IN PENNSYLVANIA 738-739 (1908).

136. *Contra*, PAULSEN at 4-5.

scious of his movements, and beyond self-restraint.

Jurisdictions have devised widely different solutions in balancing the requirements of public order and discipline against the requirement of mens rea.[137] In some jurisdictions intoxication can never be a defense to any crime;[138] in other jurisdictions it is a defense only to homicide.[139] In the majority, as in Pennsylvania, intoxication is a defense to all specific intent crimes.[140] In some states the defense is restricted by legislative enactment,[141] in others it has been extended by the legislature.[142] And in some jurisdictions intoxication is a defense to most general intent crimes.[143] Present Pennsylvania law takes a middle position between the (relatively few) jurisdictions which deny the defense completely and the (relatively few) jurisdictions which permit it to be raised in many general intent crimes. But, it is submitted, the modern Pennsylvania rule is too narrow because it refuses to recognize the affirmative defense in general intent crimes (short of "settled" conditions of insanity), even where a state of unconsciousness rendered the actor incapable of any conscious criminal intent, and even though it permits the defense in specific intent crimes. Clearly the distinction between specific and general intent is important in the case of the ordinary branch of the defense, but once the affirmative side of the defense is reached, the reason for the distinction disappears, and the defense should be available, to some extent, to all defendants.

Perhaps the best solution is to acknowledge the requirement of mens rea by permitting the defense to all crimes except those resting upon criminal negligence, and except those in which by legislative enactment intoxication is made either an element of the offense or no defense. On the other hand, the demands of public order and discipline should be recognized by setting the standard of sufficient intoxication at the high level of unconsciousness of conduct. Relatively few cases appear to be involved and the defendant will have the burden of proof by a preponderance. If history is any guide, the burden will be heavy,[144] perhaps

137. One of the more interesting solutions seems to have evolved in Monte Negro, where, it is reported, half the punishment was remitted when the intoxicated person committed violence against a friend or stranger, but the full sanction was applied when the violence was directed against an enemy. H. HAGGARD & E. JELLINEK, ALCOHOL EXPLORED 122 (1942). This unique approach seems to have disappeared along with the country which fathered it.

138. *See* Annot., 8 A.L.R.3d 1236, 1240-46 (1966).

139. *See* Chittum v. Commonwealth, 211 Va. 12, 174 S.E.2d 779 (1970).

140. *See* Annot., 8 A.L.R.3d 1236, 1246-63 (1966).

141. *See* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 356-57 (1962); L. HALL & S. GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 338 (2d ed. 1958); Annot., 8 A.L.R.3d 1236 (Supp. 1970).

142. *See* Commonwealth v. Ingram, 440 Pa. 239, 246 n.1, 270 A.2d 190, 193 n.6 (1970).

143. *See* G. WILLIAMS, CRIMINAL LAW 559-74 (2d ed. 1961).

144. *See* Commonwealth v. Chapman, 359 Pa. 164, 58 A.2d 433 (1948).

too heavy, unless courts are more willing to recognize the likelihood of alcohol-related insanity when the facts suggest it. If, on the other hand, it is felt desirable to continue to distinguish between "settled" cases of alcohol-induced insanity and "temporary" conditions of unconsciousness, then perhaps the difference can be acknowledged by creating an offense of "drunk and dangerous"[145] which would mitigate the full legal sanctions in cases of "temporary" alcoholic insanity.

145. *See* G. WILLIAMS, CRIMINAL LAW 573-74 (2d ed. 1961).

APPENDIX A

SELECTED PENNSYLVANIA CASES ON INTOXICATION AS A DEFENSE TO A CRIMINAL CHARGE

I. Homicide Crimes

A. Murder

(1) *The modern Pennsylvania rule on intoxication as a defense.* Intoxication sufficient to deprive the mind of the power to from a design with deliberation and premeditation, and to properly judge the natural consequences of an act may reduce[1] murder in the first degree to murder in the second degree.

Commonwealth v. Mosley, Pa. , 279 A.2d 174 (1971); Commonwealth v. Ingram, 440 Pa. 239, 270 A.2d 190 (1970); Commonwealth v. Barnosky, 436 Pa. 59, 258 A.2d 512 (1969); Commonwealth v. Brabham, 433 Pa. 491, 252 A.2d 378 (1969); Commonwealth v. McCausland, 348 Pa. 275, 35 A.2d 70 (1944).

(2) *The burden of proof of a sufficient degree of intoxication is upon the defendant.*

Commonwealth v. Barnosky, 436 Pa. 59, 258 A.2d 512 (1969); Commonwealth v. Chapman, 359 Pa. 164, 58 A.2d 433 (1948); Commonwealth v. Jones, 355 Pa. 522, 50 A.2d 317 (1947); Commonwealth v. Iacobino, 319 Pa. 65, 178 A. 823 (1935); Commonwealth v. Troy, 274 Pa. 304, 118 A. 252 (1922); Commonwealth v. Detweiler, 229 Pa. 304, 78 A. 271 (1910).

(3) *The degree of the defendant's intoxication is a question of fact, not a question of law.*

Commonwealth v. Johnson, 410 Pa. 605, 190 A.2d 146 (1963); Commonwealth v. Jones, 355 Pa. 522, 50 A.2d 317 (1947).

(4) *The intoxication of the defendant may be taken into account in assessing punishment, at the discretion of the court.*

Commonwealth v. Thompson, 381 Pa. 299, 113 A.2d 274 (1955); Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216 (1954); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353, *cert. denied*, 338 U.S. 862, *reh. denied*, 338 U.S. 888 (1949); Commonwealth v. Brooks, 355 Pa. 551, 50 A.2d 325 (1947).

(5) *Intoxication is no defense if the criminal intent was formed before the defendant became intoxicated.*

Commonwealth v. McMurray, 198 Pa. 51, 47 A. 952 (1901); Goersen v. Commonwealth, 106 Pa. 477 (1884); Nevling v. Commonwealth, 98 Pa. 322 (1881).

(6) *Intoxication and insanity related[2] or distinguished.*

Commonwealth v. Ingram, 440 Pa. 236, 270 A.2d 190 (1970) (dis-

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1. *See* note 122 main text *supra.*
2. The cases in which the defenses of insanity and intoxication are

tinguished); Commonwealth v. Farrow, 382 Pa. 61, 114 A.2d 170 (1955) (contrasted); Commonwealth v. Iacobino, 319 Pa. 65, 178 A. 883 (1935) (compared as affirmative defenses); Commonwealth v. Snyder, 224 Pa. 526, 73 A. 910 (1909) (distinguished); Commonwealth v. Woodley, 166 Pa. 463, 31 A. 202 (1895) (compared); Commonwealth v. Werling, 164 Pa. 559, 30 A. 406 (1894) (contrasted); Goersen v. Commonwealth, 106 Pa. 477 (1884) (compared); Commonwealth v. Meyers, 83 Pa. 131 (1876) (contrasted); Jones v. Commonwealth, 75 Pa. 403 (1874) (related)[3]; Commonwealth v. Baker, 11 Phila. 631 (Pa. C. P. 1876) (compared); Commonwealth v. Platt, 11 Phila. 415, 421 (Pa. C. P. 1876) (distinguished); Commonwealth v. Hart, 2 Brewst. 546 (Pa. 1868) (related); Commonwealth v. Crozier, 1 Brewst. 349 (Pa. 1867); (*mania a potu*); Commonwealth v. Moore, 2 Pitts R. 502 (Pa. C. P. 1864) (*mania a potu*).

(7) *Other murder cases in which intoxication was raised as a defense.*

Commonwealth v. Brown, 436 Pa. 423, 260 A.2d 742 (1970); Commonwealth v. Kline, 341 Pa. 238, 19 A.2d 59 (1941); Commonwealth v. Lehman, 309 Pa. 486, 164 A. 526 (1932); Commonwealth v. Prescott, 284 Pa. 255, 131 A. 184 (1925); Commonwealth v. Walker, 283 Pa. 468, 129 A. 453 (1925); Commonwealth v. Lisowski, 274 Pa. 222, 117 A. 794 (1922); Commonwealth v. Boyd, 246 Pa. 529, 92 A. 705 (1914); Commonwealth v. Keeler, 242 Pa. 416, 89 A. 558 (1913); Commonwealth v. Brent, 233 Pa. 381, 82 A. 469 (1912); Commonwealth v. Fencez, 226 Pa. 114, 75 A. 19 (1910); Commonwealth v. Nazarko, 224 Pa. 204, 73 A. 210 (1909); Commonwealth v. Eyler, 217 Pa. 512, 66 A. 747 (1907); Commonwealth v. Dudash, 204 Pa. 124, 53 A. 756 (1902); Commonwealth v. West, 204 Pa. 68, 53 A. 542 (1902); Commonwealth v. McGowan, 189 Pa. 641, 42 A. 365 (1899); Commonwealth v. Cloonen, 151 Pa. 605, 25 A. 145 (1892); Commonwealth v. McMillan, 144 Pa. 610, 22 A. 1029 (1891); Commonwealth v. McManus, 143 Pa. 64, 21 A. 1018 (1891); Commonwealth v. Cleary, 135 Pa. 64, 19 A. 1017 (1890); McClain v. Commonwealth 110 Pa. 263, 1 A. 45 (1885); McGinnis v. Commonwealth, 102 Pa. 66 (1883); Brooks v. Commonwealth, 61 Pa. 352 (1869); Keenan v. Commonwealth, 44 Pa. 55 (1862); Warren v. Commonwealth, 37 Pa. 45 (1860); Kilpatrick v. Commonwealth, 31 Pa. 198 (1858); Kelly

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held to merge or approach one another are of doubtful authority. *See* main text.

3. Jones v. Commonwealth has been distinguished, confined to its facts, and otherwise limited or even rejected (*sub silentio*). *See* Commonwealth v. Walker, 283 Pa. 468, 129 A. 453 (1925); Commonwealth v. Lehman, 309 Pa. 486, 164 A. 526 (1932); Commonwealth v. Detweiler, 229 Pa. 304, 78 A. 271 (1910); Nevling v. Commonwealth, 98 Pa. 322 (1881).

v. Commonwealth, 1 Grant 484 (Pa. 1858); Pennsylvania v. M'Fall, Add. 255 (Pa. 1794).

B. Felony Murder

Intoxication is not a defense to homicide committed during the perpetration of a felony.[4]

Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966); Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216 (1954); Commonwealth v. Thompson, 367 Pa. 102, 79 A.2d 401 (1951); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353, *cert. denied*, 338 U.S. 862, *reh. denied*, 338 U.S. 888 (1949); Commonwealth v. Brooks, 355 Pa. 551, 50 A.2d 325 (1947); Commonwealth v. Wooding, 355 Pa. 555, 50 A.2d 328 (1947); United States *ex rel.* Rucker v. Myers, 311 F.2d 311 (3d Cir. 1962), *cert. denied*, 374 U.S. 844 (1963) (interpreting Pennsylvania law).

C. Voluntary Manslaughter

Intoxication is not a defense to voluntary manslaughter.

Commonwealth v. Ingram, 440 Pa. 236, 270 A.2d 190 (1970); Commonwealth v. Brown, 436 Pa. 423, 260 A.2d 742 (1970); Commonwealth v. Reid, 432 Pa. 319, 247 A.2d 783 (1968); Commonwealth v. Walters, 431 Pa. 74, 244 A.2d 757 (1968).

II. Non-Homicide Crimes

A. Assault and Battery

Intoxication is not a defense to simple assault and battery.

Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1967) (dictum).

B. Burglary

Intoxication is a defense to burglary.

Commonwealth v. Bell, 189 Pa. Super. 389, 150 A.2d 174 (1959); Commonwealth v. Silverman, 8 Bucks 238 (Pa. C.P. 1958).

C. Carrying a Concealed Weapon.

Intoxication is a defense to a charge of carrying a concealed weapon.

Commonwealth v. Hart, 101 Pitts. L.J. 449 (Pa. C.P. 1953).

D. Criminal Fraud

Intoxication is a defense to a charge of criminal fraud.

Commonwealth *ex rel.* Dunbar v. Keenan, 196 Pa. Super. 592 (1962), 176 A.2d 135, *cert. denied*, 371 U.S. 839 (1963).

4. *But see* Commonwealth v. Thompson, 381 Pa. 299, 113 A.2d 274 (1955), where the defense was apparently allowed despite the fact that the murder was committed during (an attempted?) rape.

E. Larceny

Intoxication is a defense to larceny.

Commonwealth v. Ault, 10 Pa. Super. 651 (1899).

F. Obstructing an Officer

Intoxication has been held not to be a defense to a charge of obstructing an officer.[5]

Commonwealth v. Spega, 19 Beav. 11 (Pa. C.P. 1957).

G. Receiving

Intoxication has been held not to be a defense to a charge of receiving stolen goods.[6]

Commonwealth v. Trowbridge, 13 Beav. 251 (Pa. C.P. 1951).

H. Robbery

Intoxication is a defense t o robbery.[7]

Commonwealth v. Hart, 101 Pitts. L.J. 449 (Pa. C.P. 1953). *See also* Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966); Commonwealth v. Thompson, 367 Pa. 102, 79 A.2d 401 (1951).

I. Other crimes

Commonwealth v. Heatter, 177 Pa. Super. 374, 111 A.2d 371 (1955) (held a defense to assault with intent to ravish); Respublica v. Weidle, 2 Dall. 88 (Pa. 1781) (held not a defense to "misprision of treason").

III. Evidence of Intoxication

A. Duty to Reveal

Failure to reveal evidence of intoxication is an unlawful suppression by the state, and is grounds for habeas corpus and a new trial.

United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955) (interpreting Pennsylvania law).

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5. This case appears to be incorrectly decided since the statutory offense requires a specific intent to obstruct.

6. This case appears to be incorrectly decided since receiving requires a specific intent (*i.e.*, receiving with a fraudulent purpose).

7. *Contra*, Commonwealth v. Trowbridge, 13 Beav. 251 (Pa. C.P. 1951). *Hart* would appear to be correct, and *Trowbridge* incorrect, since robbery is a specific intent crime.

APPENDIX B

MODEL JURY INSTRUCTIONS

These model instructions have been written for those cases in which the defense of intoxication is truly affirmative, *i.e.*, for those cases in which the defendant contends that he was so intoxicated that he was unable to form a specific criminal intent. Where evidence of intoxication is introduced, along with other evidence, only for the purpose of negativing an asserted specific intent, and the defense is not founded on an alleged incapacity to form a specific intent, the defense is not properly affirmative in nature, and no special instruction is required. The instructions are based strictly on current Pennsylvania law and cases; they are written for specific intent crimes, but the formulas could easily be adapted to general intent crimes if, as advocated in the main text, the intoxication defense were made available to some general intent crimes.

I. HOMICIDE[1]

(A) Murder. The defendant is charged with murder in the first degree. Murder in the first degree requires the formation of a wilful, deliberate, premeditated design to kill. The defense has introduced evidence that defendant, at the time of the killing, was intoxicated from the use of (alcoholic beverages). The defense contends that defendant's state of intoxication was such that defendant was unable to have or to form the required specific intent to wilfully, deliberately, and premeditatedly kill the deceased. There is no contention that defendant was or became intoxicated involuntarily. That is, the defendant in this case was or became intoxicated, if he was so intoxicated, by his own free will.

In general, voluntary intoxication is neither an excuse for nor a defense to a criminal charge, and it will not relieve a defendant from responsibility for crime. However, voluntary intoxication may be a defense to murder in the first degree, a crime which requires the specific intent to kill. Voluntary intoxication may reduce the crime of murder to murder in the second degree only,[2] a crime which does not require a specific intent to kill. Thus while the crime remains murder, your task is to decide whether, if you find defendant guilty of murder, it is murder in the first degree or murder in the second degree. If you find the defendant guilty of murder, you should find him guilty of murder in the second degree if you believe from a preponderance of the evidence that defendant was so intoxicated that he was incapable of having or form-

1. This instruction is based on the cases cited in Appendix A at I.a(1). *See also* B. LAUB, PENNSYLVANIA TRIAL GUIDE, § 195 at 370 (1959).
2. *See* note 122 main text *supra*.

ing the specific intent to kill. That is, you should find the defendant guilty of murder in the second degree if you find that intoxication had so clouded his mind as to deprive the defendant of his power of deliberation and premeditation, making him incapable of forming a wilful, deliberate, and premeditated design to kill, and making him incapable of judging properly his acts and their consequences.

I remind you that while the state has the burden of proving beyond a reasonable doubt that the defendant committed the murder charged, defendant has the burden of proving that such a degree of intoxication existed, and that the defendant need prove this only by a preponderance of the evidence.[3] Otherwise stated, if you find that the defendant committed the murder charged, and if you believe that the evidence makes it more likely than not[4] that the defendant's degree of intoxication was as great as he contends, then defendant has carried his burden of proof, and you should find him guilty of murder in the second degree. Otherwise you should find defendant guilty of murder in the first degree.[5]

(B) Felony murder.[6] The defendant is charged with a murder which occured during a (robbery) (burglary) (——) in which he was an alleged participant. A murder perpetrated during the commission of a (robbery) (burglary) (——) is murder in the first degree, irrespective of the intention or design of the killers. The defense has introduced evidence that the defendant was intoxicated at the time of the killing. The intoxication of the defendant, even if proved to your satisfaction, has no bearing upon the charge of murder. The question of intoxication is irrelevant to the charge of murder. If you find that the defendant was engaged in committing the crime of (robbery) (burglary) (——), and that the murder occurred during the commission of such crime, then the defendant is guilty of murder in the first degree, regardless of the intent of the perpetrators, and regardless of defendant's degree of intoxication. The defendant's alleged intoxication is relevant only to the question of the intent to commit the crime of (robbery) (burglary) (——).[7]

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3. *See* cases cited in Appendix A at I.a(2).
4. *See* SeLing Hoisery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950) for this alternative formulation of the meaning of "by a preponderance of the evidence."
5. Intoxication, even when not sufficient to constitute an affirmative defense to crime, may be a relevant consideration in sentencing. *See* Appendix A at I.a(4).
6. This instruction is based on the cases cited in Appendix A at I.B. *See also*, B. LAUB, PENNSYLVANIA TRIAL GUIDE, § 195 at 371-72 (1959).
7. *See* note 50 main text *supra*.

II. Felonies Other Than Murder[8]

The defendant is charged with (robbery) (burglary) (larceny) (——). In the crime of (robbery), (etc.) it is necessary that, in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime cannot be committed. That is, in the crime of (robbery) (etc.), a necessary element is the existence in the mind of the perpetrator of the specific intent to (take from the person or immediate presence of another, against his will, and by means of force and fear) (etc.), and unless such intent exists the crime of (robbery) (etc.) is not committed.

The defense has introduced evidence that, at the time of the alleged (robbery) (etc.), the defendant was intoxicated from the use of (alcoholic beverages). Although intoxication or drunkenness alone will never excuse the commission of a (robbery) (etc.), the fact that a defendant may have been intoxicated at the time of the (robbery) (etc.) may negate the existence of a specific intent to commit that crime. Thus, evidence that a defendant acted or failed to act while in a state of intoxication is to be considered in determining whether or not the defendant acted, or failed to act, with the required specific intent to commit (robbery) (etc.), as charged. If you believe that the defendant was so intoxicated at the time of the alleged (robbery) (etc.) that he could not have or form the specific intent to commit the offense, you should acquit the defendant. If you believe that the defendant was not intoxicated to such an extent, intoxication is no defense, and you should find the defendant guilty.

I remind you that while the state has the burden of proving beyond a reasonable doubt that the defendant committed the (robbery) (etc.) charged, the defendant has the burden of proving that such a degree of intoxication existed, and that the defendant need prove this only by a preponderance of the evidence. Otherwise stated, if you believe that the evidence makes it more likely than not that the defendant's degree of intoxication was so great that he could not have or form the required specific intent to commit (robbery) (etc.), then defendant has carried his burden of proof, and you should find him not guilty. Otherwise you should find the defendant guilty.

8. This instruction is based on the cases cited in Appendix A at II.B, II.E., II.H, and II.I, as well as upon 1 Devitt & Blackmar, Federal Jury Practice and Instructions (1970), and 1 California Jury Instructions (1958).

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